federal law that call for the removal of obstructions to air navigation and forbid interference with the routing of aircraft. This issue is critically important to the safety of the 46 million annual flights to and from the 5200 public use airports subject to federal regulation. If allowed to stand, the decisions below mean that such airports often will have to await the approval of state and local officials *before* removing trees and other objects that threaten the safety of takeoffs and landings—a situation that poses an obvious, direct threat to air safety.

This case arises out of a dispute over the removal of trees obstructing the takeoff and landing path of the Goodspeed Airport in East Haddam, Connecticut. Current FAA regulations call for removal of "obstructions to air navigation," including natural or manmade objects that exceed the height of an airport runway's "approach surface," as well as removal of items that block a "runway protection zone." 14 C.F.R. §§ 77.21(a), 77.23(a)(5); FAA Advisory Circular No. 150/5300-13, §§ 211a(6), 212. To comply with these federal regulations, petitioners removed from neighboring property trees that obstructed the navigable airspace necessary for takeoffs and landings at the airport. The state department of environmental protection and the local wetlands commission sued petitioners, claiming that their removal of those trees violated applicable land use laws. The state courts agreed, rejecting petitioners' arguments that the state land use laws were preempted.

The decisions below encroach on the federal government's ability to ensure the safety of air traffic. Moreover, the decisions below directly conflict with the holdings of two federal courts of appeals that runways and runway protection zones are part of the navigable airspace, and they highlight a general division in the lower courts about the relationship between federal regulation of the navigable airspace and state and local regulation of land use near airports. These decisions also contravene the United

States' "strong interest in assuring that its exclusive sovereignty over navigable airspace is preserved and that its comprehensive scheme of airspace management is not undermined by state[] law." Br. for *Amicus Curiae* The United States of America 6, in *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001) (No. 00-2545).

In sum, review is warranted to preserve the safety of air travel, to provide clear guidance on the scope of preemption under federal aviation law, and to ensure that Congress's mandate that "the Federal Government shall have exclusive sovereignty of the airspace of the United States" (49 U.S.C. § 40103) is not undermined by applications of state and local land use regulations that affect aircraft flight patterns and jeopardize the safety of takeoffs and landings.

A. Exclusive Federal Regulation of Air Safety

Ever since the Air Commerce Act of 1926, the federal government has had "complete and exclusive national sovereignty in the air space" of the United States. *United States* v. *Causby*, 328 U.S. 256, 260 (1946) (quotations omitted). Federal regulation of the airspace is "intensive and exclusive. *** [An airport's or aircraft's] privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

Today, the federal interest in aviation is reflected most prominently in two statutes: the Airline Deregulation Act of 1978 ("ADA"), which provides that "a State *** may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1); and the Federal Aviation Act of 1958 (the "Act"), which created the Federal Aviation Administration ("FAA") and gave it exclusive authority to regulate the navigable airspace of the United States. As with prior law, the Act contains an express

preemption provision that recognizes the federal government's "exclusive sovereignty of the airspace of the United States." 49 U.S.C. § 40103(a). The Act further clarifies that exclusive federal regulation of the "navigable airspace" extends to regulation of the "airspace needed to ensure safety in the takeoff and landing of aircraft." *Id.* § 40102(a)(30).

The Act requires the FAA's Administrator to develop plans and policies for the efficient use of navigable airspace and to ensure air safety. 49 U.S.C. § 40103(b)(1). Pursuant to this mandate, FAA regulations set standards for aircraft airworthiness and certification of personnel and airports; designate the various classes of airspace; establish air traffic routes; and govern all aspects of flight operations, including minimum and maximum altitudes. See 14 C.F.R Parts 61-67, 71, 91, and 139.

Most relevant here are the FAA's regulations governing "objects affecting navigable airspace." See 14 C.F.R. Part 77. Those regulations establish standards for determining whether objects constitute "obstructions to air navigation." 14 C.F.R. § 77.21(a). These standards apply not only to manmade objects but also to "objects of natural growth[] and terrain" at airports. *Ibid.* To protect air safety, FAA regulations call for the removal of obstructions to air navigation, whether natural or manmade. FAA Advisory Circular No. 150/5300-13, §§ 211a(6), 212.

This case concerns certain "obstructions to air navigation" near Runway 14/32 at Goodspeed Airport in East Haddam, Connecticut. An object is an "obstruction to air navigation" if it exceeds the height of either the "primary surface" or the "approach surface" of a federally regulated runway. 14 C.F.R. § 77.23(a)(5). The "primary surface" at an airport having hard-surface runways is a surface longitudinally centered on a runway and extending 200 feet beyond each end of that runway. *Id.* § 77.25(c). The primary surface for a runway such as Runway 14/32 is 250 feet wide.

Ibid. A diagram illustrating the primary surface (Appendix I) is set forth at Pet. App. 114a.

The "approach surface" is a surface "longitudinally centered on the extended runway centerline and extending outward and upward from each end of the primary surface. An approach surface is applied to each end of each runway based upon the type of approach available or planned for that runway end." 14 C.F.R. § 77.25(d). The approach surface for a runway such as Runway 14/32 begins at the same width as the primary surface and expands uniformly to a width of 1250 feet. *Id.* § 77.25(d)(1). The approach surface extends 5000 feet horizontally at a slope of 20 to 1. *Id.* § 77.25(d)(2). Diagrams illustrating the approach surface (Appendix J) and the calculation of the 20-to-1 approach slope (Appendix K) are set forth at Pet. App. 115a-116a.

The FAA also defines a "runway protection zone," a trapezoidal area centered on the extended runway centerline. FAA Advisory Circular No. 150/5300-13, § 212a(1). The protection zone for Runway 14/32 begins 200 feet beyond the end of the area usable for takeoff and landing, at the edge of the primary surface. *Ibid.* The zone begins at the same width as the primary surface—250 feet—and widens to 450 feet over a distance of 1000 feet. See FAA Advisory Circular No. 150/5300-13, Table 2-4.

Most important for present purposes, federal regulations call for the removal of objects of natural growth, such as trees, that obstruct air navigation by penetrating the primary surface or the approach surface, and objects that are incompatible with the function of the runway protection zone. See FAA Advisory Circular No. 150/5300-13, §§ 211a(6), 212. Moreover, the FAA specifically forbids forestry activities in the runway protection zone, on account of the danger to air safety posed by trees. *Id.* § 212a(2). As explained below, applications of land use regulations that interfere with an airport's removal of trees that obstruct air navigation or the runway protection zone are preempted by

the Act, which grants the federal government exclusive control over the navigable airspace, and by the ADA, which prohibits the "enforce[ment]" of any state law or regulation that "relates to" the "routes" of air carriers.

B. Goodspeed Airport and Maintenance of Runway 14/32

Petitioner Timothy Mellon owns Goodspeed Airport, which is "open to the general public with or without a prior request to use the airport," and thus is subject to FAA regulation as an "airport available for public use." 14 C.F.R. § 77.2; Pet. App. 3a. The Airport has a single hard-surface runway that extends from northwest to southeast for about 2100 feet. This runway, Runway 14/32, is classified as a "utility runway" under FAA regulations. 14 C.F.R. § 77.2.

Goodspeed Airport has been in operation since the mid-1960s. To keep the runway's "approach surface" and the "runway protection zone" free from obstructions, Mellon and his predecessors from time to time have entered adjacent properties to remove or cut back trees that obstruct the flight path of aircraft that use the Airport. Pet. App. 17a. Trees growing on properties located just south of the Airport have posed the most serious problem.

The centerline of a tidal creek feeding the nearby Connecticut River forms the southern boundary of the Airport and the northern boundary of property owned by the East Haddam Land Trust (the "Land Trust"). Just south of the Land Trust property lies a small piece of property owned by The Nature Conservancy (the "Conservancy"), and just south of the Conservancy property is a pond known as Chapman's Pond. The distance from the end of Runway 14/32 to the southern boundary of the Airport property is 630 feet. The distance from that boundary to the southern boundary of the Land Trust property is 335 feet. And the distance from that boundary to the southern boundary of the Conservancy property (where it abuts Chapman's Pond) is 100 feet. Pet. App. 3a-4a. The total

distance from the end of Runway 14/32 to Chapman's Pond is therefore 1065 feet. Thus, the Airport's runway protection zone—which ends 1200 feet from the end of the runway—extends across the Land Trust and Conservancy properties.[1]

The critical importance of keeping Goodspeed's runway protection zone clear of obstructions was demonstrated in 1991—prior to Mellon's purchase of the Airport—when a small plane lost power shortly after taking off from Runway 14/32, but could not land in the runway protection zone because it was covered by trees. See Trial Tr. (Mar. 4, 2004) at 155. The pilot was forced to land in Chapman's Pond. The impact bent one of the plane's wings, which pinned the door shut, and the pilot and his passengers drowned. *Ibid.*

Trees growing on the properties south of the Airport continued to pose safety risks throughout the 1990s. In 1999, the year before this dispute arose, an inspector from the Connecticut Department of Transportation directed petitioners to remove a line of trees that were "obstructions to air navigation" under FAA regulations. See Commission App. A68-A85.[2] According to the inspector's report, the heights of these trees resulted in a 7-to-1 ratio for the approach surface, while "[p]er FAA's Part 77 [regulations], the minimum approach slope for this runway should be 20:1." *Id.* at A69. Petitioners complied with the inspector's mandate and eliminated the encroaching trees. Goodspeed Reply App. A19.

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[1] For an aerial view of Goodspeed Airport and nearby properties, see http://www.airstripamerica.com/cgi-bin/apt_info?42B and http://www.shoreline-aerial.com/examples/tours.htm.

[2] "Commission App." refers to the appendix to the initial brief filed by the Commission in *East Haddam Inland Wetlands and Watercourse Commission* v. *Goodspeed Airport, LLC* in the court below. "Goodspeed App." refers to the appendix to the initial brief filed by petitioners in that case, and "Goodspeed Reply App." refers to the appendix to their reply brief.

By late 2000, trees on the Land Trust and Conservancy properties continued to threaten the safety of takeoffs and landings at the Airport. In response to this hazard, Mellon directed petitioner Timothy Evans, an independent contractor who later became the Airport's manager, to enter those properties and remove the trees. Pet. App. 4a.

Forestry experts determined that of the 340 trees that Evans removed, at least half were more than 35 feet tall, and at least one tree was more than 70 feet tall. Pet. App. 4a. A large number of the trees therefore exceeded the height of the "approach surface" of Runway 14/32—which has "an elevation of 21.5 feet at the point where the airport property abuts the land trust's property but only approximately thirty-eight feet at the point where the land trust's property abuts the conservancy's property." *Id.* at 10a. Moreover, all the removed trees were located in Runway 14/32's "runway protection zone," which stretches across the Land Trust and Conservancy properties at ground level.

C. The Commission's Order and Regulations

The 2.5 acres that petitioners cleared lie within an area regulated by respondents, the East Haddam Inland Wetlands and Watercourses Commission (the "Commission") and its enforcement officer, James Ventres. Pet. App. 4a. In January 2001, the Commission issued an order directing petitioners to "[c]ease and [d]esist from all regulated activity within seventy-five feet of inland/wetlands and watercourses (regulated areas) on your property * * * and adjoining properties." Commission App. A28.

The Commission charged that petitioners had violated its local land use regulations by "conductir g a regulated activity within 75 feet of a regulated area"—"specifically, clear cutting of a flood plain forest * * * without obtaining proper permits or determination from the Wetlands

Commission." *Id.* at A29.[3] Because the Airport itself lies within a "regulated area" under the Commission's regulations, the order prohibited petitioners from clearing any vegetation, including trees, on the *Airport* property as well as the Land Trust and Conservancy properties.

D. Proceedings in the Trial Court

In March 2003, the Commission filed suit against petitioners, alleging that they had violated state law and local regulations by removing trees from regulated wetlands without first obtaining a permit. The Land Trust and the Conservancy were also named as defendants because any remediation activities that might be ordered by the court would occur on their properties. They in turn filed cross-claims against petitioners, alleging trespass and certain state-law statutory violations. Pet. App. 69a.

The state Department of Environmental Protection ('DEP") filed its own lawsuit against petitioners, alleging that their removal of trees from the Land Trust and Conservancy properties constituted an unreasonable impairment of wetlands and a floodplain forest, in violation of the Connecticut Environmental Protection Act ("CEPA"). *Ibid.* The DEP's case was tried jointly with the Commission's case. Pet. App. 67a-68a.

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[3] The Commission's land use regulations (Commission App. A222-A246) provide that "[a]ny person wishing to undertake a regulated activity within a regulated area shall apply for a permit to the Commission." Regulations, Town of East Haddam Inland/Wetlands and Watercourses Comm'n, § 6.1. The regulations define a "regulated activity" as "any operation within or use of a wetland or watercourse including removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses." *Id.* § 2.1(j). They define a "regulated area" as any inland wetlands or watercourse. *Id.* § 2.1(k). In making its decision on a permit application, the Commission may seek comment from various local government agencies and community interest groups. *Id.* §§ 6.11 & 7.1(b).

As a defense to the claims of both the Commission and the DEP, petitioners argued that federal law preempts application of state and local land use regulations to obstruction-clearing activities required by federal law. The trial court rejected this argument, concluding that "the federal approach slope standards and the local and state wetlands provisions regulate disparate activities and are concerned with unrelated topics" that "touch only remotely and tangentially." Pet. App. 73a. Noting that "[t]he wetlands regulations contain neither prescriptions nor proscriptions regarding navigable airspace or the removal of objects therefrom," the court failed to recognize that some *applications* of state and local land use rules may interfere with the navigable airspace. *Ibid.* The trial court thus found that federal law did not preempt application of either the CEPA or the Commission's regulations to petitioners' tree removal. Pet. App. 74a.

Applying the CEPA, the court ruled that the DEP was entitled to judgment on its claim for impairment of a floodplain forest (though not the claim for impairment of the wetlands) and ordered petitioners to pay $50,000 to support an academic or government-funded research project to be identified by the DEP. *Id.* at 84a, 95a. Applying the Commission's regulations, the court ordered petitioners to pay a civil penalty of $17,500 for cutting trees in a regulated wetlands area without a permit. *Id.* at 94a. In addition, the court enjoined petitioners from engaging in any regulated activity on the Land Trust and Conservancy properties without first obtaining a permit. *Ibid.*

With respect to the trespass claim asserted by the Land Trust and the Conservancy, the court found that petitioners had a prescriptive easement to enter the properties to cut trees, but that petitioners exceeded the scope of the easement by clear-cutting trees. Pet. App. 90a-91a. The court thus entered judgment in favor of the Land Trust and the Conservancy, ordering petitioners to pay one dollar in

damages and to observe what the court viewed as the limits of their long-established easement. *Id.* at 97a.

E. Proceedings in the Connecticut Appellate Courts

Petitioners appealed the trial court's decisions to the state's intermediate appellate court. The other parties cross-appealed. Before decision, however, the Supreme Court of Connecticut transferred both appeals to itself pursuant to Conn. Gen. Stat. § 51-199(c). Pet. App. 3a, 59a.

The Supreme Court of Connecticut affirmed the trial court's ruling that petitioners had a prescriptive easement to enter the Land Trust and Conservancy properties and remove trees, but exceeded the scope of that easement by clear-cutting the area. Accordingly, the court affirmed the trial court's injunction and award of nominal damages for trespass. Pet. App. 13a.

The court further held that the finding of a trespass disposed of petitioners' preemption defense. "[B]ecause the airport defendants had no right under state property law to clear-cut the land," the court reasoned, "they had no such right under federal law and, accordingly, we need not reach their claim that federal law preempts state and local land use law." Pet. App. 8a. The court reached this decision while acknowledging that many of the trees at issue were over 70 feet tall and protruded into the approach surface. See *id.* at 4a (describing the height of the trees that were cut); *id.* at 10a n. 15 (explaining that the "approach surface" was 21.5 feet high at the property line between the Airport and Land Trust properties and 38 feet high at the property line between the Land Trust and Conservancy properties).

The court cited *Griggs* v. *Allegheny County*, 369 U.S. 84, 88-89 (1962), for its holdings that the "navigable airspace" under federal law "includes airspace required for planes to land and takeoff safely," and that the "interference with use and enjoyment of neighboring land *** amounts to [a] constitutional taking and entitles landowners to

compensation." Pet. App. 13a-14a. Nonetheless, the court ultimately confused the question whether petitioners had a preemptive federal obligation to keep the approach surface clear with the question whether the owners of the neighboring properties were entitled to compensation under state law for any trespass involved in fulfilling that obligation. The court thus failed to distinguish petitioners' rights vis-à-vis the Commission from its rights vis-à-vis the neighboring landowners, ruling that the trespass determination resolved the entire case. *Id.* at 8a, 27a.[4]

The court used the same reasoning to reject petitioners' preemption defense in the DEP's case. Pet. App. 61a. The court affirmed the trial court's judgment for the DEP on its floodplain-forest claim and reversed its ruling that the DEP could not prevail on its wetlands claim. *Id.* at 59a, 63a. Indeed, the court instructed the trial court on remand to render judgment for the DEP on that claim, since

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[4] In the court below, petitioners conceded that to some extent they exceeded the scope of their prescriptive easement under state law to cut trees on the Land Trust and Conservancy properties. They further conceded that to the extent that they did so, the Land Trust and Conservancy were entitled to compensation. This was evidently the basis for the court's suggestion that petitioners made a "concession" that "in the absence of any state law property right to enter the land trust defendants' properties for the purpose of trimming and cutting trees, federal law would confer no such right." Pet. App. 26a. The question whether the Land Trust and Conservancy were entitled to compensation for trespass, however, is analytically separate from the question whether federal law permits the Commission to impose permitting requirements on petitioners' federally authorized clearing activities. *Cf. Griggs*, 369 U.S. at 88-89 (holding that overflights may not be enjoined under state law even if they constitute a taking for which compensation must be paid). That is the subject of this petition, and petitioners did not concede that state law governs this issue, which was fully briefed and argued below.

petitioners' removal of trees without permission constituted an unreasonable impairment of the wetlands.[5] *Id.* at 64a.

Petitioners moved the court below to reconsider its rulings, and in particular its handling of the preemption issue, but those motions were denied on October 25, 2005. Pet. App. 98a, 100a. By orders entered November 29, 2005, the court below stayed its decisions pending the outcome of proceedings in this Court. *Id.* at 99a, 101a. On January 17, 2006, this Court extended the time for filing the petition for certiorari to and including February 22, 2006.

REASONS FOR GRANTING THE WRIT

The decisions below pose a grave threat to the safety of air travel to and from the nation's 5200 public use airports. If allowed to stand (and thereby to influence regulatory and legal decisions in Connecticut and elsewhere), these decisions mean that airport owners must leave in place trees and other "obstructions to air navigation"—objects that protrude into the flight paths of aircraft taking off or landing—while state and local officials process permit applications and hold hearings to determine whether removing such obstructions serves *local* political interests. Recent data on plane crashes involving trees that blocked flight paths confirm that this is potentially a life-and-death issue for 600,000 pilots and millions of passengers on more than 46 million flights each year. See Federal Aviation Admin., *Administrator's Fact Book* 8, 25 (Aug. 2005).

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[5] This remand does not undermine the finality of the judgment in *Rocque*. On remand, the trial court will merely enter a judgment for the DEP on its wetlands claim and determine whether the CEPA authorizes any additional relief. Pet. App. 64a-65a. Thus, "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975). Accordingly, the judgment in *Rocque* is final and reviewable under 28 U.S.C. § 1257(a).

Moreover, the decisions below directly conflict with the decisions of two federal courts of appeals, which have held that land use laws may *not* be applied to runway or "clear zone" modifications needed to ensure the safety of takeoffs and landings. Indeed, the lower courts are confused about the preemptive effect of federal aviation law on generally applicable laws that, while designed to address garden-variety land use issues, *in application* affect trees or other objects that obstruct the navigable airspace. In addition, the decisions below are contrary to the position of the United States, which has defended the view that preemption under the Act is so complete as to support *removal* to federal court of state trespass claims to which the Act provides a defense.

In sum, this Court's review is urgently needed to protect the millions of travelers who fly to and from the nation's public use airports, to resolve the lower-court conflict on the scope of preemption of land use laws that affect safety in the airspace, and to uphold Congress's mandate that "the Federal Government shall have exclusive sovereignty of the airspace of the United States." 49 U.S.C. § 40103.

I. The Decisions Below Involve A Recurring Issue Of Great Importance To The Safety Of Millions Of Passengers Traveling To And From The Nation's 5200 Public Use Airports.

The question whether federal law preempts applications of state and local land use regulations that affect air safety on takeoff and landing is one of vital importance to the more than 5200 public use airports regulated by the FAA. Safety is the first priority of these airports and of the air carriers that use them, which have a "duty *** to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A).

Safety was also Congress's most important concern in adopting the Federal Aviation Act, which charges the Administrator of the FAA to regulate "*in a way that best tends*

to reduce or eliminate the possibility or recurrence of accidents in air transportation." *Id.* § 44701(c) (emphasis added). As then-Justice Rehnquist explained in *City of Burbank* v. *Lockheed Air Terminal, Inc.*: "The paramount substantive concerns of Congress were to regulate federally *all* aspects of air safety and, once aircraft were in 'flight,' airspace management." 411 U.S. 624, 644 (1973) (dissenting opinion) (emphasis added; citations omitted).

The decisions below undermine the safety-based policies of the FAA. As noted above, federal regulations call for the removal of "obstructions to air navigation"—objects that pierce the approach surface—as well as obstructions in the runway protection zone at public airports. These requirements are critical to minimizing the risk of harm to pilots, passengers, and people on the ground. The presence of trees and other obstructions in aircraft flight paths results not only in shortening or closing runways, but in alterations of flight paths, in difficulty maneuvering through steep approaches or, worse, in plane crashes. If the patchwork of state and local regulations that govern trees, wetlands, and land use are the final word on removal of obstructions that threaten safe takeoffs and landings, the federal interest in safe air travel will be thwarted. As the Court put it in *Lockheed*, "[t]he Federal Aviation Act requires a delicate balance between safety and efficiency and the protection of persons on the ground," and "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." 411 U.S. at 638-639.

This concern for the safety of takeoffs and landings is not merely hypothetical. It is well known that "most accidents occur[] during takeoff and landing, despite the relatively short duration of these phases compared to the entire profile of a normal flight." See National Transportation Safety Board, *Annual Review of Aircraft*

Accident Data: U.S. General Aviation, Calendar Year 2000, at 33 (2004). What is less well known is that objects that obstruct air navigation—including trees—are one of the leading causes of air crashes and fatalities. In 2000, for example, 152 general aviation accidents and 45 fatalities were attributed to "in-flight collision[s] with objects." *Id.* at 32. Moreover, "each of the top ten chains of fatal accident occurrences included an in-flight collision with terrain or object." *Id.* at 35.

Moreover, how to deal with *trees* protruding into aircraft flight paths or obstructing runway protection zones is a major issue that public use airports routinely face. Controversies over the removal of such trees have arisen in both large urban areas and small towns, and in at least 15 States: Washington,[6] California,[7] Ohio,[8] Michigan,[9]

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[6] G. Weeks, *Judge to Port: Remove Dangerous Trees by Nov. 1*, Anacortes American (Anacortes, Wash.), Apr. 8, 2005 (state trial court ruling requiring the Port of Anacortes, Washington to remove "trees potentially endangering air traffic at the Anacortes Airport"); J. Godden, *Next Time, They'll Hire an Arborist*, Seattle Times, Feb. 2, 1994, at B1 (opposition to King County International Airport's clear-cutting of more than 50 trees that "had grown into the airport glide path in violation of FAA regulations").

[7] W. Bee, *Rancho Murieta Airport Sues Over Cutting Trees Near Runway*, Sacramento Bee, July 9, 2004, at B2 (suit by airport to remove trees that were "obstructions on the [runway's] 'approach surfaces'"); B. Lindelof, *Flight Risk Safety Concerns Are Threatening Trees at the Rancho Murieta Airport*, Sacramento Bee, Apr. 13, 2002, at B1 ("[t]o comply with FAA rules, as many as 43 of the trees will need to be removed" because the trees are obstructions).

[8] L. Warren, *Airport Files for Nearby Land*, Dayton Daily News, Jan. 10, 2003, at B1 (failure of two years of negotiations and airport's subsequent lawsuit to remove trees "in and below the airport flight path"); J. Kuehner, *Metroparks to Make Way for Planes*, Cleveland Plain Dealer, June 4, 2004, at B3 (Cleveland "was given the go-ahead to cut and trim 88 trees" so "the final leg of the new $129 million Hopkins airport runway can be used safely * * *

New York,[10] Illinois,[11] Wisconsin,[12] Rhode Island,[13] Maine,[14] Florida,[15] Virginia,[16] Massachusetts,[17] Pennsylvania,[18] South

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despite appeals from neighboring residents to reject the move or at least delay it").

[9] D. Guthrie, *Next Case: Trees vs. Runway*, Grand Rapids Press, Jan. 5, 2003, at A1 (suit by airport seeking to compel neighbors to cut down a 75-foot strip of trees blocking flight path after neighbors refused to sell property); B. Deiters, *Judge Will Settle Feud Between Couple, Airport*, Grand Rapids Press, June 12, 2004, at A3 (dispute "that pits tall trees against low-flying aircraft will be settled in court after a Tyrone Township couple continues to fight an airport's demand to cut back trees for a runway").

[10] J. Rather, *Islip Takes Off*, New York Times, Feb. 18, 2001, at 14LI (discussing neighbors' response to clearing of "noise-buffering trees" on corner of airport property as "safety measure" pursuant to FAA regulations); M. Rosenberg, *Airport Safety vs. Quakers' Serenity*, New York Times, May 2, 1993, at 13WC (discussing opposition to Westchester County Airport's removal of 10 acres of trees where "dictated by the Federal Aviation Administration's directive to provide a safer runway approach").

[11] G. Worland, *Prairie Wild Card in Airport Future*, Rockford Register Star, May 14, 2001, at 7A (discussing local airport's removal, pursuant to FAA rules, of trees that created habitat for birds and deer but blocked lines of sight from the control tower).

[12] R. LaFrombois, *Neighbors Not Happy About Downtown Airport's Tree Cutting*, Wausau Daily Herald, June 10, 2005, at 1A (opposition to removal of trees that "had to be cut down to meet Federal Aviation Administration airspace requirements").

[13] V. Watson, *Newport State Airport Gets $100,000 U.S. Grant*, Providence Journal-Bulletin, June 25, 1999, at 1C (reporting on environmental implications of tree removal; citing FAA spokesman that removal "falls in step with requirements by the FAA that airports maintain clear areas at the end of runways").

[14] S. Mack, *Pittsfield Airport Plan Hindered by Trees*, Bangor Daily News, Jan. 17, 2001 (municipal airport's effort to obtain an environmental permit to cut trees on municipal airport property).

Carolina,[19] and North Carolina.[20] The substantial conflict generated by airport tree removal confirms the importance of Congress's decision to place decisions affecting air safety beyond the reach of local political pressures and prejudices—a decision that the rulings below undermine.

It would be tragic if it took further fatalities to establish the importance of this issue. But the many reports of crashes involving trees obstructing flight paths or runway protection zones at public use airports—including the 1991

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[15] E. Backhaus, *Airport Authority Rejects $25,000 Audubon Request*, Orlando Sentinel, Mar. 7, 1998, at D12 (dispute between airport and conservation group arising from removal of trees at end of proposed runway pursuant to FAA requests based on the "safety hazard to aircraft").

[16] J. Harper, *Waiting for the Trees to Grow*, The Virginian-Pilot (Norfolk, Va.), May 23, 1996, at 12 (citing opposition to removal of "[h]undreds of trees" that "exceeded height limits set by the Federal Aviation Administration for trees standing within an airport's runway protection zone").

[17] S. Allen, *Airport Development Alarms Environmentalists*, Boston Globe, Oct. 8, 1995, at 37 (noting environmentalists' opposition to "15 Massachusetts airports * * * knocking down trees on more than 2,000 acres to create clear air space for runway approaches").

[18] N. Williams, *Milford Residents Voice Concerns on Tree Cutting, Plans for Airport*, Morning Call (Allentown, Pa.), Apr. 16, 2003, at B2 (citing environmentalists' opposition to "tree cutting and development plan launched by the airport").

[19] J. McDermott, *John's Island Trees on Chopping Block*, Post and Courier (Charleston, S.C.), Aug. 22, 1998, at A1 (discussing opposition to tree removal despite fact that under "Federal Aviation Administration safety regulations" and "guidelines, the trees pose a danger to pilots trying to land in bad weather").

[20] *UNC-CH Planning to Remove Trees*, News & Observer (Raleigh, N.C.), Oct. 15, 2005, at B6 ("UNC-Chapel Hill will cut down trees that have grown too high in the Horace Williams Airport runway approach to comply with Federal Aviation Administration rules").

crash at Goodspeed—confirm that such a possibility cannot be discounted. See also, *e.g.*, T. Richardson, *Pilot Is Injured as Plane Crashes in Marlborough*, Boston Globe, Aug. 8, 2004, at B4 (reporting on crash at airport where "large spruces near the 1,682-foot runway * * * often force pilots who are landing to make a sudden descent," and quoting a witness as saying: "It will take a fatality or something for the FAA to force people to take the trees down."); J. Tedesco, *Plane Crash Claims Rancher*, San Antonio Express-News, Jan. 19, 2002, at 1B (reporting death of pilot of plane that "crashed in a patch of trees on the edge of the airport property").

In sum, the question presented is potentially one of life-and-death significance for the 600,000 pilots and millions of passengers who take off and land at public use airports each year. This Court's review is needed to ensure their safety.

II. The Decisions Below Conflict With The Decisions Of Two Federal Courts Of Appeals And Are Contrary To The Position Of The United States.

Certiorari is also warranted because the decisions below conflict with decisions of two federal courts of appeals and are contrary to the expressed views of the United States.

A. The Decisions Below Conflict With Decisions Of The Second And Ninth Circuits.

1. The decisions below are in direct conflict with the Second Circuit's decision in *United States* v. *City of New Haven*, 496 F.2d 452, 454 (2d Cir. 1974), which held that the Federal Aviation Act preempted application of state law to a public runway's "clear zone"—another name for the "runway protection zone" at issue here.[21] That case arose

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[21] See *Richmond, Fredericksburg & Potomac R.R. Co.* v. *Metropolitan Washington Airports Auth.*, 468 S.E.2d 90, 92 (Va. 1996) (stating that "[a] clear zone" is "also called a 'runway protection zone'"); FAA Advisory Circular No. 150/5300-13, § 2 (defining the term "clear zone" by reference to the term "runway protection zone").

when the City of East Haven filed suit to prevent its neighbor, the City of New Haven, from buying property in East Haven for use as a "clear zone," claiming that New Haven failed to obtain the requisite state land use permit. The Connecticut courts enjoined the runway plan, whether it took "'the form of physical expansion *or mere maintenance of clear zones over property located in East Haven.*'" *Id.* at 453 (quoting the injunction) (emphasis added).

The United States subsequently brought suit in federal court, claiming that the state law injunction was preempted. The district court agreed,[22] and the Second Circuit affirmed, explaining that "the airspace above the East Haven land acquired by New Haven" was within the "clear zone" and thus was "part of the navigable airspace." *Id.* at 454. As the Second Circuit held, "the order of the New Haven Superior Court was directed to and conflicted squarely with the regulation of navigable airspace which Congress has reserved for exclusive federal control." *Ibid.* "East Haven cannot enforce its rights under Connecticut law by obtaining a state court injunction which infringes on federal regulation of navigable airspace." *Ibid.*

The Second Circuit's analysis stands in stark contrast to the decisions below, which held that the scope of federal preemption turned not on whether the trees that petitioners removed from the Airport's "runway protection zone" and "approach surface" penetrated the "navigable airspace," but on whether petitioners had a right, under state trespass law, to remove them without paying compensation. Pet. App. 8a. See *City of New Haven*, 496 F.2d at 454 (noting that "the legality under state law of New Haven's acquisition of the clear zone area is entirely separate from the question of the power of the state court to enjoin airport operations, whose regulation Congress has entirely preempted"). Runway

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[22] *United States* v. *City of New Haven*, 367 F. Supp. 1338, 1341 (D. Conn. 1973).

protection zones and the like are either inside or outside the exclusively federal "navigable airspace." This Court's review is needed to answer that question and definitively to resolve this conflict of authority.

2. The decisions below also conflict with the Ninth Circuit's decision in *Burbank-Glendale-Pasadena Airport Authority* v. *City of Los Angeles*, 979 F.2d 1338, 1340-1341 (9th Cir. 1992), which held that federal law preempted an ordinance that required the city land use commission's prior approval for the development of property used for takeoffs and landings. The airport had sought to extend a taxiway next to a runway to protect the safety of aircraft that were required to cross the runway and to take off in only one direction. The city defended the permit requirement as a mere exercise of its "police powers" that was necessary to prevent "incompatible development." *Id.* at 1339-1340.

The Ninth Circuit struck down the ordinance as a "direct interference with the movements and operations of aircraft[]." *Id.* at 1341. It rejected the city's argument that its regulation was merely an exercise of land use power, stating that "[t]he proper placement of taxiways and runways is critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace." *Ibid.* (emphasis added). Nor was the court persuaded by the argument that permitting merely *delayed* modifying the runway: "The problem with this Ordinance is that it conditions the construction and reconstruction of taxiways and runways on the prior approval of the City," the court reasoned. *Ibid.* A city "may not exercise its police power to prohibit, delay, or otherwise condition the construction of runways and taxiways at a non-city-owned airport." *Ibid.*

The Ninth Circuit's reasoning is flatly inconsistent with the decisions below. If the Ninth Circuit was correct in holding that applying land use rules to runways and taxiways at public airports amounts to regulation of the "navigable airspace," then applying such rules to "runway

protection zones" and "approach surfaces," as in this case, likewise amounts to regulation of the "navigable airspace." The court below, however, held that the scope of preemption under the federal aviation law was limited by petitioners' rights under the state law of trespass: because petitioners "had no right under state property law to clear-cut the land, they had no such right under federal law." Pet. App. 8a. As the decisions of the Ninth and Second Circuits demonstrate, this turns preemption analysis on its head. Review is warranted to resolve this conflict.

3. The conflict between the rulings below and the decisions of the Second and Ninth Circuits is representative of broad confusion about the extent to which federal aviation laws preempt applications of state and local laws that affect air safety. Two federal appeals courts have found "implied federal preemption of the entire field of aviation safety." *Abdullah* v. *American Airlines*, 181 F.3d 363, 365 (3d Cir. 1999); accord *Greene* v. *B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 794-795 (6th Cir. 2005). Two other federal appeals courts have held that federal law preempts some aspects of air safety regulation. See *French* v. *Pan Am Express, Inc.*, 869 F.2d 1, 3-7 (1st Cir. 1989); *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400, 404 (7th Cir. 1974). And two more federal appeals courts have held that federal aviation law does not preempt *any* aspect of air safety. See *Cleveland* v. *Piper Aircraft Co.*, 985 F.2d 1438, 1444 (10th Cir. 1993); *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 635 F.2d 67, 74-75 (2d Cir. 1980).[23] As the Third Circuit recently

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[23] Several courts have also held that federal aviation law does not preempt application of local land use laws to airport operations. See, *e.g.*, *Hoagland* v. *Town of Clear Lake*, 415 F.3d 693, 696-699 (7th Cir. 2005); *Gustafson* v. *City of Lake Angelus*, 76 F.3d 778, 783 (6th Cir. 1996); *Condor Corp.* v. *City of St. Paul*, 912 F.2d 215, 219 (8th Cir. 1990); *In re Commercial Airfield*, 752 A.2d 13, 15 (Vt. 2000). But even these cases frequently distinguish cases such as *Burbank* and *East Haven* on the ground that "they address the FAA's control

observed in canvassing these cases, this area is characterized by "divergent authority." *Abdullah*, 181 F.3d at 372.

It is time for this Court to clear up the confusion, resolve the conflicts discussed above, and ensure that state and local land use regulations are not allowed to interfere with the clearance of "runway protection zones," "approach surfaces," or other federally-regulated areas at public airports.

B. The Decisions Below Contravene The United States' Position On Preemption.

The decisions below also contradict the United States' position in a brief recently filed in the Seventh Circuit, which outlined a broad view of preemption under the Federal Aviation Act. Brief for *Amicus Curiae* The United States of America, *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001) (No. 00-2545). *Vorhees* arose in state court, when an airport's neighbor brought suit to prevent use of the runway for takeoffs and landings that interfered with the enjoyment of his property. The complaint alleged only state law claims, but the defendants removed the action to federal court on the theory that federal regulation of aviation law "completely preempted" the plaintiff's claim. The district court allowed removal, stating that interfering with takeoffs and landings at the airport would "require the defendants to change their routes and flight patterns," and that "regulation of the patterns and flights of aircraft is solely within the sovereignty of the federal government." 96 F. Supp. 2d 820, 822-824 (N.D. Ill. 2000).

The issue on appeal was whether preemption under the Federal Aviation Act was so complete as to support removal of state trespass claims to which the Act provides a defense.

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over navigable airspace and aviation safety." See, *e.g.*, *Commercial Airfield*, 752 A.2d at 16 (distinguishing *Burbank* on the ground that it involved "safety and airspace issues," because "the runway expansion would improve safety").

The United States filed a brief in support of affirmance. Citing the Federal Aviation Act, the brief began by explaining that "[t]he United States has a strong interest in assuring that its exclusive sovereignty over navigable airspace is preserved and that its comprehensive scheme of airspace management is not undermined by state[] law." U.S. Br. 6. It went on to state that "[t]he usual presumption against finding preemption of state law does not apply where, as here, the 'State regulates in an area where there has been a history of significant federal presence.'" *Id.* at 10 n. 5 (quoting *United States* v. *Locke*, 530 U.S. 89, 108 (2000)).

On the merits, the United States argued that "the district court correctly ruled that the FAA preempts plaintiff's law suit." U.S. Br. 8. It acknowledged that the relief sought by the plaintiff was "formally directed at the use of an airport *runway*," but explained that "'the purpose *and indeed the effect*' of the injunction would be 'to exclude physically aircraft *from the airspace* superadjacent to his lands.'" *Id.* at 11 (emphasis added). Noting that "all nine members of the Court [in *Lockheed*] agreed that Congress intended to preempt states from regulating aircraft in flight," the brief contended that "States may not manage the airspace," because such regulation "would seriously interfere with public air travel and undermine the exclusive regulatory scheme." *Id.* at 10, 12.

The decisions below are directly contrary to this reasoning. Like the state law at issue in *Vorhees*, the CEPA and the Commission's regulations at issue here are not "formally directed at" takeoffs, landings, or the clear zone extending from a public airport's runway. But like the state law at issue in *Vorhees*, the "*effect*" of these land use regulations is to prevent the removal of trees that interfere with the ability of aircraft to navigate through "the airspace superadjacent to [airport] lands." As the United States recognizes, state law need not target the airspace to interfere with air safety—and in particular the safety of takeoffs and

landings. If state law is applied so as to interfere with the airspace, it is preempted to that extent.

A divided panel in *Vorhees* held that preemption under the Act is not complete—that is, it did not support removal of the plaintiff's case—but acknowledged that his state law claim was almost certainly preempted. "Most issues of airflight and navigable airspace, probably including take-offs and landings, are within the sovereign regulatory powers of the federal government," the court explained, and "it would be difficult at best to convince a state court that the claim about trespass to airspace * * * would not interfere with the federal regulatory apparatus." 272 F.3d at 405. The dissent went even further, expressly adopting the position of the United States, quoting its brief at length, and concluding: "Were flight not completely preempted but left to all the state courts across this country, air transportation could only be chaotic and dangerous. *Runway use cannot be viewed separately. Runways cannot be used for takeoffs and landings without affecting flight patterns.*" *Id.* at 406 (H. Wood, J., dissenting) (emphasis added).

The decisions below are thus in tension with the majority and dissenting views in *Vorhees*, and with the position advanced there by the United States—which itself confirms the importance of broad federal preemption to the safety of the nation's airways. *Vorhees* also illustrates the confusion among lower court judges on the scope of preemption under the Federal Aviation Act, which provides additional reason for this Court's review.

III. The Decisions Below Are Inconsistent With The Federal Aviation Act, The Airline Deregulation Act, And This Court's Preemption Doctrine.

Review is also warranted to correct the lower court's serious misunderstanding of the scope of preemption under the Federal Aviation and Airline Deregulation Acts. Congress may preempt state law expressly or by

establishing a regime of pervasive federal regulation that occupies a particular field. See *English* v. *General Elec. Co.*, 496 U.S. 72, 78 (1990). In addition, federal law preempts state law where there is a conflict between the two, either because it is impossible to comply with both federal and state law, *ibid.*, or because the requirements of state law "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

These "categories of preemption," however, are not "rigidly distinct," *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 n. 6 (2000), and the ultimate question is one of congressional intent, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Here, it is clear that Congress intended to preempt applications of land use regulations that interfere with the safety of the navigable airspace—whether the case is viewed through the lens of express or implied preemption.

A. Express Preemption

To begin with, the Federal Aviation Act expressly grants the FAA "*exclusive* sovereignty" over the navigable airspace, "including *the airspace necessary for safe takeoffs and landings.*" 49 U.S.C. §§ 40103, 40102(a)(30) (emphasis added). The land use regulations at issue here directly apply to—and interfere with—the removal of trees in "the airspace necessary for safe takeoffs and landings." Thus, they are preempted.

To be sure, just as many FAA rules involve no issue of land use (*e.g.*, airspace classifications), many applications of land use laws to public airports (*e.g.*, parking rules) present no issue involving airspace safety—and thus no preemption issue. But this case falls between these two categories: it involves state and local regulations that protect objects (trees) that threaten aviation safety when they transgress the "approach surface" or "runway protection zone" of a public use airport.

Where applications of land use regulations *do* interfere with aviation safety, moreover, state and local officials may not hide behind labels such as "land use" to shield those regulations from preemption. And here, the navigable airspace clearly includes "the airspace needed to ensure safety in the takeoff and landing of aircraft." Indeed, even the dissent in *Lockheed* noted the difference between "control 'over the ground space' of airports," which is not typically preempted, and "regulating aircraft in flight," which "Congress clearly intended to pre-empt the States from regulating." 411 U.S. at 644 (Rehnquist, J., dissenting). Where trees block federally regulated runway and approach areas, they affect "aircraft in flight." The court below thus erred in concluding that local rules preventing removal of such trees are not preempted under the Federal Aviation Act.

Similarly, the Airline Deregulation Act expressly bars States and localities from "*enforc[ing]*" any "regulation" that is "*related to* a *** *route* of an air carrier." 49 U.S.C. § 41713(b)(1). As this Court explained in *Morales*, the phrase "relating to" has "a broad pre-emptive purpose" and an "expansive sweep." 504 U.S. at 383, 384. For a state law to "relate to" the route of an air carrier, the law and the route need only "have a "connection," or "stand in some relation" to, or "have bearing" on, one another. *Id.* at 383 (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)).

The land use laws at issue here plainly have a "bearing" on, "connection with," or "relation" to the "route of an air carrier." The direct effect of the regulations is to require carriers that use Goodspeed Airport to adjust their routes, either by using another airport entirely or by adopting a much steeper approach path to Runway 14/32.[24] In holding

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[24] "When an approach slope is steeper than the twenty to one ratio required by Federal Aviation Administration regulations *** the permissible landing point is shifted from the end of the runway to

that preemption here is limited by the scope of petitioners' state law property rights, the court below failed to accord proper respect to the broad scope of ADA preemption.

B. Implied Preemption

Congress's intent to displace applications of state and local land use laws to the navigable airspace is shown not only by these express preemption provisions, but also by implication from the pervasive scheme of federal regulation of the airspace and air safety.

Federal law regulates a broad range of air safety issues. The Federal Aviation Act specifically charges the FAA to regulate "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents" (49 U.S.C. § 44701(c)), and it charges air carriers "to provide service with the highest possible degree of safety" (*id.* § 44701(d)(1)(A)). Pursuant to its statutory mandate, the FAA regulates pilot and flight instructor qualifications; aircraft mechanics and repairmen; airspace classification; flight rules, including minimum safe altitudes; and, importantly, "objects affecting navigable airspace." See 14 C.F.R. Part 77; *id.* Parts 61, 65, 71, 91.

In short, federal regulation of airspace and air safety is comprehensive. As Justice Jackson once observed:

> Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hand of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a

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a point [farther down the runway] where the twenty to one approach slope is achieved." Pet. App. 17a n. 22. The evidence demonstrates, however, that such a "displaced threshold," which effectively shortens the usable portion of a runway, jeopardizes air safety on landing, especially at airports having relatively short runways. See Trial Tr. (Mar. 4, 2004) at 146-147, 149-150.

> runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state governments.

Northwest Airlines, 322 U.S. at 303.

Application of the CEPA and the Commission's regulations is preempted because it conflicts with this comprehensive scheme of federal regulations that ensure air safety on takeoff and landing. To begin with, it is simply not possible for Goodspeed Airport to comply fully with *both* the FAA's obstruction-clearance rules *and* the land use regulations at issue here. Federal regulations require keeping the "approach surface" and "runway protection zone" clear of obstructions, including trees. See 14 C.F.R. §§ 77.21(a), 77.23(a)(5); FAA Advisory Circular No. 150/5300-13, §§ 211a(6), 212. By contrast, the Commission's cease-and-desist order forbids petitioners from engaging in any "regulated activity" such as tree removal within 75 feet of any "regulated area"—which includes both the Airport's property and the neighboring properties—without a permit. Petitioners' compliance with federal law is thus dependent on a local permitting decision that necessarily delays, and may outright deny, their ability to make Runway 14/32 safe for landing. That is a textbook example of conflict preemption. See *Burbank*, 979 F.2d at 1341.

At a minimum, application of CEPA and the Commission's regulations frustrates the "full purposes and objectives of Congress" in adopting the Federal Aviation Act. See *Hines*, 312 U.S. at 67. The Act establishes a comprehensive scheme for regulating the airspace—including the airspace necessary to ensure safe takeoffs and landings—and "[t]he Congressional purpose is clear[:] to

empower the [FAA] to make rules as to safe altitudes of flight at any elevation"—and thus to prevent collisions. *Allegheny Airlines, Inc.* v. *Village of Cedarhurst*, 238 F.2d 812, 815 (2d Cir. 1956). Pursuant to its statutory mandate, the FAA determines what objects constitute "obstructions to air navigation" and requires clearance of the spaces necessary for takeoffs and landings. By vesting in the DEP or the Commission the final authority to decide what conditions are necessary to ensure safe takeoffs and landings at Goodspeed Airport, the land use regulations at issue here "interfere[] with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987).

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In summary, this Court should review the decisions below to establish definitively the supremacy of federal regulation of the navigable airspace, including the airspace necessary for safe takeoffs and landings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2006

APPENDIX

APPENDIX A

SUPREME COURT OF CONNECTICUT

James VENTRES et al.
v.
GOODSPEED AIRPORT, LLC, et al.
No. 17280.

Argued Apr. 14, 2005.
Decided Aug. 30, 2005.

John R. Bashaw, New Haven, for the appellants-appellees (named defendant et al.).

Michael J. Donnelly, Hartford, for the appellees-appellants (defendant the Nature Conservancy et al.).

Mark K. Branse, Glastonbury, with whom was John J. Radshaw III, Hartford, for the appellees-appellants (plaintiffs).

SULLIVAN, C.J., and BORDEN, NORCOTT, PALMER and ZARELLA, Js.

SULLIVAN, C.J.

This appeal arises out of a complaint filed by the plaintiffs, the inland wetlands and watercourses commission (commission) of the town of East Haddam (town) and its enforcement officer, James Ventres, against the defendants, Timothy Mellon, Goodspeed Airport, LLC (airport), Timothy Evans, the East Haddam Land Trust (land trust) and the Nature Conservancy (conservancy). The plaintiffs alleged that Mellon, Evans and the airport (collectively, airport defendants) violated the town's inland wetlands regulations by failing to obtain a permit before cutting down trees and other vegetation on two properties owned, respectively, by the land trust and the conservancy

(collectively, land trust defendants).[1] The land trust defendants filed a cross claim against the airport defendants claiming, inter alia, that they had: (1) trespassed on their land and converted their trees; (2) violated General Statutes § 22a-16 of the Connecticut Environmental Protection Act;[2] and (3) violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. On the motion of the airport defendants, the trial court struck the CUTPA cross claim. Thereafter, the matter was tried to the court,[3]

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[1] The plaintiffs alleged in the second count of the complaint that the airport defendants wilfully had violated the town's inland wetlands regulations. The trial court subsequently dismissed the second count of the complaint and the plaintiffs have not challenged that ruling on appeal.

[2] General Statutes § 22a-16 provides: "The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state."

[3] The case was tried jointly with an action brought by Arthur J. Rocque, the commissioner of environmental protection, against Mellon, the airport, the land trust and the conservancy. The trial court's ruling in that case is the subject of the airport defendants'

which rendered judgment for the plaintiffs. With respect to the cross claims, the court concluded that the airport defendants had a prescriptive easement to enter the land in order to trim or cut trees that interfered with air traffic, but that the airport defendants' conduct had unreasonably expanded or intensified the easement. Accordingly, the trial court rendered judgment against the airport defendants on the trespass cross claim. The trial court rendered judgment for the airport defendants on the cross claim for conversion and for the land trust defendants on the cross claim pursuant to § 22a-16. The airport defendants appealed[4] from the trial court's judgment and the plaintiffs and the land trust defendants cross appealed. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. The airport is located on Lumberyard Road in East Haddam. It is an "[a]irport available for public use" within the meaning of title 14 of the Code of Federal Regulations, § 77.2.[5] Mellon is the sole member of Goodspeed Airport, LLC. Evans is an independent contractor who has been the manager of the airport since November, 2003, and is responsible for managing its day-to-day activities.

The airport's southern boundary lies approximately along the centerline of a tidal creek that flows in a westerly direction into the Connecticut River. That boundary forms

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appeal in the companion case of *Rocque v. Mellon*, at 275 Conn. 161, 881 A.2d 972 (2005).

[4] The airport defendants appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

[5] Title 14 of the Code of Federal Regulations, § 77.2, defines an "[a]irport available for public use" as "an airport that is open to the general public with or without a prior request to use the airport."

the northern boundary of property owned by the land trust, which extends for approximately 335 feet to the south, where it abuts property owned by the conservancy. The conservancy's property extends for another 100 feet to the south, at which point it abuts Chapman Pond. The airport has a 2100 foot runway that runs in a north-south direction. The southern end of the runway is approximately 630 feet north of the airport's southern boundary and 1100 feet north of Chapman Pond.

Between November 29 and December 5, 2000, Evans, at the direction of Mellon and without the permission of the land trust defendants, cut down all of the trees, bushes and woody vegetation on approximately 2.5 acres of land located between the southern boundary of the airport property and Chapman Pond. Approximately 340 trees were destroyed, including some that were 100 years old and seventy-two feet high. The airport defendants claim that the trees and vegetation posed a danger to aircraft landing at and taking off from the runway. The 2.5 acres were entirely within a regulated wetlands area as defined by General Statutes § 22a-38 (15)[6] and were part of a wildlife refuge and nature preserve that extends along the Connecticut River.

Thereafter, the plaintiffs brought this action alleging that the airport defendants had failed to obtain from the commission a permit to conduct a regulated activity[7] within

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[6] General Statutes § 22a-38 (15) defines " '[w]etlands' " as "land, including submerged land, not regulated pursuant to sections 22a-28 to 22a-35, inclusive, which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and floodplain by the National Cooperative Soils Survey, as may be amended from time to time, of the Natural Resources Conservation Service of the United States Department of Agriculture . . . ."

[7] General Statutes § 22a-38 (13) defines " '[r]egulated activity' " as "any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction,

a wetlands area as required by General Statutes § 22a-42a(c)(1)[8] and the town's inland wetlands regulations.[9] The airport defendants raised numerous special defenses to the plaintiffs' complaint, including a claim that the federal aviation law preempts local wetlands regulations. The land trust defendants brought cross claims against the airport defendants alleging, inter alia, that they had violated CUTPA, trespassed on their land and converted their trees, and that they had caused "unreasonable pollution, impairment or destruction" of a natural resource of the state in violation of § 22a-16 by clear-cutting the trees. Upon the motion of the airport defendants, the trial court struck the CUTPA cross claim. After a trial to the court, the court rejected the airport defendants' special defense of preemption and rendered judgment for the plaintiffs. With respect to the land trust defendants' remaining cross claims, the court found that the airport defendants had a prescriptive easement to enter the land owned by the land trust defendants for the purpose of trimming or cutting trees that interfered with air traffic, but that clear-cutting the trees

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construction, alteration or pollution, of such wetlands or watercourses . . . ."

[8] General Statutes § 22a-42a (c)(1) provides in relevant part: "On and after the effective date of the municipal regulations promulgated pursuant to subsection (b) of this section, no regulated activity shall be conducted upon any inland wetland or watercourse without a permit. Any person proposing to conduct or cause to be conducted a regulated activity upon an inland wetland or watercourse shall file an application with the inland wetlands agency of the town or towns wherein the wetland or watercourse in question is located . . . ."

[9] The town's inland wetlands regulations were prepared in accordance with the Inland Wetlands and Watercourses Act, General Statutes § 22a-28 et seq., and are substantially similar to the statutes that they are intended to implement. For convenience, we refer to the text of the statutes.

had unreasonably exceeded and intensified the easement. Accordingly, the court rendered judgment for the land trust defendants on their trespass claim and on their claim pursuant to § 22a-16. The court found the airport defendants jointly and severally responsible for paying a civil penalty of $17,500 pursuant to General Statutes § 22a-44 (b)[10] and ordered that they contribute $50,000 to an academic or government funded research project to be identified by the department of environmental protection pursuant to General Statutes § 22a-16a(3).[11] In addition, the

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[10] General Statutes § 22a-44(b) provides in relevant part: "Any person who commits, takes part in, or assists in any violation of any provision of sections 22a-36 to 22a-45, inclusive, including regulations adopted by the commissioner and ordinances and regulations promulgated by municipalities or districts pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense . . . ."

[11] General Statutes § 22a-16a provides in relevant part: "In any action brought by the Attorney General under section 22a-16 or under any provision of this title which provides for a civil or criminal penalty for a violation of such provision, the court, in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded, may order the defendant (1) to provide for the restoration of any natural resource or the investigation, remediation or mitigation of any environmental pollution on or at any real property which resource or property are unrelated to such action, (2) to provide for any other project approved by the Commissioner of Environmental Protection for the enhancement of environmental protection or conservation of natural resources, (3) to make a financial contribution to an academic or government-funded research project related to environmental protection or conservation of natural resources, or (4) to make a financial contribution to the Special Contaminated Property Remediation and Insurance Fund established under section 22a-133t provided the total aggregate amount of all contributions to said fund under this section shall not exceed one million dollars per fiscal year . . . ."

court enjoined the airport defendants from "engaging in any regulated activity on the land south of the tidal brook without obtaining a [wetlands] permit" and from entering the land trust defendants' property without their consent, except in a manner consistent with the prescriptive easement. Finally, the court ordered the airport defendants to pay damages in the amount of $1 to the land trust defendants on the trespass claim and to pay attorney's fees to be determined by the court.

On appeal, the airport defendants claim that the trial court improperly determined that: (1) federal aviation law does not preempt state and local wetlands regulations; (2) the failure to obtain a wetlands permit can give rise to an independent action under § 22a-16; (3) the removal of vegetation is a regulated activity under § 22a-38 (13); and (4) Mellon is personally liable for cutting the trees. The plaintiffs raise as an alternate ground for affirmance that the airport defendants have not established a factual record on which a claim of preemption can be predicated. They claim on cross appeal that the trial court improperly: (1) failed to order the airport defendants to restore the land to its original condition and imposed monetary penalties that were insufficient to restore it, thereby thwarting the remedial purpose of § 22a-16; and (2) calculated the per diem monetary penalties pursuant to § 22a-44 (b). The land trust defendants claim on cross appeal that the trial court improperly: (1) found a prescriptive easement in favor of the airport; (2) struck their cross claim pursuant to § 42-110a; and (3) determined that they were not entitled under General Statutes § 52-560[12] to damages measured by the cost

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[12] General Statutes § 52-560 provides: "Any person who cuts, destroys or carries away any trees, timber or shrubbery, standing or lying on the land of another or on public land, without license of the owner, and any person who aids therein, shall pay to the party injured five times the reasonable value of any tree intended for sale or use as a Christmas tree and three times the reasonable

of replacing the trees and precluded them from introducing evidence of the replacement value.

We conclude that the trial court properly determined that the airport defendants had a prescriptive easement to maintain an approach slope over the land trust defendants' property, but that they exceeded the scope of the easement by clear-cutting the land.[13] We further conclude that, because the airport defendants had no right under state property law to clear-cut the land, they had no such right under federal law and, accordingly, we need not reach their claim that federal law preempts state and local land use law. With respect to the plaintiffs' claims on cross appeal, we conclude that the trial court properly determined that the airport defendants should not be required to restore the land to its original condition and properly determined the amount of monetary penalties pursuant to § 22a-16. We further conclude that the trial court properly determined the per diem monetary penalties pursuant to § 22a-44 (b). With respect to the land trust defendants' claims on cross appeal, we conclude that the trial court properly granted the airport defendants' motion to strike the CUTPA claim. We further conclude that the trial court properly determined that the replacement cost of the trees was not a proper measure of damages pursuant to § 52-560. Accordingly, we affirm the judgment of the trial court.

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value of any other tree, timber or shrubbery; but, when the court is satisfied that the defendant was guilty through mistake and believed that the tree, timber or shrubbery was growing on his land, or on the land of the person for whom he cut the tree, timber or shrubbery, it shall render judgment for no more than its reasonable value."

[13] In this opinion, we use the phrase "clear-cut" to mean cutting close to the ground all trees and vegetation on a given property.

I

We first address the airport defendants' claim that the trial court improperly determined that federal aviation law does not preempt local wetlands regulations. We conclude that we need not reach this claim because we conclude that the airport defendants had no right under state property law to clear-cut the land belonging to the land trust defendants and because the airport defendants have conceded that, in the absence of a property right, federal law would not confer such a right.

The airport defendants claim that they removed the vegetation from the land trust defendants' properties pursuant to federal regulations and guidelines governing the maintenance of unobstructed "runway protection zones"[14] and approach surfaces[15] for airports like the one in

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[14] The Federal Aviation Administration has issued an advisory circular setting forth federal standards and recommendations for airport design. See Federal Aviation Administration, Advisory Circular No. 150/5300-113 (Sept. 29, 1989). The advisory circular states that "[t]he standards and recommendations contained in this advisory circular are recommended by the Federal Aviation Administration for use in the design of civil airports." The circular recommends that airports maintain a "[r]unway protection zone"; *id.*, § 211(a)(7); from which "incompatible objects and activities" should be cleared. *Id.*, § 212(a)(1). The purpose of the runway protection zone "is to enhance the protection of people and property on the ground." *Id.*, § 212. For runways like the one in the present case, the circular recommends that the runway protection zone extend 1000 feet beyond the end of the runway and increase in width from 250 feet at the end nearest the runway to 450 feet at the far end. *Id.*, p. 19, table 2-4.

[15] The Federal Aviation Administration has issued regulations establishing "standards for determining obstructions to air navigation" that "apply to the use of navigable airspace by aircraft . . . ." 14 C.F.R. § 77.21(a). Such obstructions include "existing and proposed manmade objects, objects of natural growth, and terrain." *Id.* Title 14 of the Code of Federal

the present case. They further argue that the regulations and guidelines are designed to protect navigable airspace, [16]over which the United States has exclusive authority, and

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Regulations, § 77.23, provides that "(a) [a]n existing object . . . is, and a future object would be, an obstruction to air navigation if it is of greater height than any of the following heights or surfaces . . . (5) The surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.25 . . . ." Section 77.25(d) of title 14 of the Code of Federal Regulations defines the "[a]pproach surface" for the type of airport at issue in the present case as a surface that starts 200 feet from the end of the runway; 14 C.F.R. § 77.25(c) (primary surface ends 200 feet beyond end of runway); and expands uniformly from a width of 250 feet; 14 C.F.R. § 77.25(c)(1); to a width of 1250 feet at a horizontal distance of 5000 feet from the beginning of the approach surface. 14 C.F.R. § 77.25(d)(1)(i); 14 C.F.R. § 77.25(d)(2)(i). The approach surface also rises at a slope of twenty to one for a horizontal distance of 5000 feet. 14 C.F.R. § 77.25(d)(2)(i). In the present case, an approach surface with a twenty to one slope would have an elevation of approximately 21.5 feet at the point where the airport property abuts the land trust's property and approximately thirty-eight feet at the point where the land trust's property abuts the conservancy's property.

[16] Section 40102(a)(30) of title 49 of the United States Code defines "navigable airspace" as "airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft . . . ."

Title 14 of the Code of Federal Regulations, § 91.119, provides in relevant part: "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
"(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
"(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

that, therefore, they preempt state laws that would give state or local authorities the power to prevent the removal of obstructions to air traffic in such areas.[17] The airport defendants appear to argue in their brief that, because the federal government has exclusive jurisdiction over navigable airspace, they could remove obstructions within the navigable airspace without regard to either state property law or state and local land use regulations. At oral argument before this court, however, they clarified that they claim only that they had a right to remove obstructions within the navigable airspace over the land trust defendants' properties because they had acquired a prescriptive right to enter the properties for that purpose under state property law. They conceded that, in the absence of that prescriptive property right, federal law would not confer any such right. See *Westchester v. Greenwich*, 745 F. Supp. 951, 955 (S.D.N.Y. 1990) (federal law does not create private cause of action in favor of owner of airport to institute action against neighboring landowner whose trees are encroaching on navigable airspace); see also *Westchester v. Greenwich*, 756 F. Supp. 154, 156 (S.D.N.Y.

"(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure . . . ."

[17] The airport defendants point to two federal statutes that they claim preempt state and local environmental legislation as applied to their conduct in this case. Section 40103(a)(1) of title 49 of the United States Code provides: "The United States Government has exclusive sovereignty of airspace of the United States." Section 41713(b)(1) of title 49 of the United States Code provides in relevant part: "[A] State . . . [or] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."

1991) (owner of airport did not have power of eminent domain or express clearance easement and therefore could interfere with neighboring landowner's ability to grow trees only if it could establish easement by prescription or public nuisance).[18] They claim that they have acquired a prescriptive clearance easement in the land trust defendants' properties under state property law and that federal law preempts any state and local laws that otherwise might limit their easement rights.[19] The land trust defendants counter that the trial court improperly determined that the airport defendants had a prescriptive easement because: (1) the airport defendants failed to meet their burden of establishing the scope of the easement; and (2) the existence of a boundary line agreement between the predecessors in title to the airport and the land trust prevents the airport from obtaining a prescriptive easement pursuant to General Statutes § 47-38.[20] They further argue that, even if the

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[18] The Westchester case had a long subsequent history and, as we discuss later in this opinion, eventually came before this court. See *Westchester v. Greenwich*, 227 Conn. 495, 629 A.2d 1084 (1993). The District Court's conclusions that there is no private cause of action under federal law in favor of an airport owner against neighboring landowners whose trees are encroaching on navigable airspace and that an airport may interfere with a neighboring landowner's ability to grow trees only if it has acquired a property right to do so, however, have never been disturbed.

[19] Neither the trial court nor the parties characterized the easement at issue in the present case as a clearance easement. The trial court concluded, however, that the airport defendants had "acquired a prescriptive easement to go onto the 2.5 acre area, on occasion, and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway." As we discuss later in this opinion, this is essentially the definition of a clearance easement.

[20] General Statutes § 47-38 provides: "The owner of land over which a right-of-way or other easement is claimed or used may give notice in writing, to the person claiming or using the

airport defendants had a prescriptive easement, state and local land use law applies to the use of the easement.

We conclude that the trial court properly determined that the airport defendants have acquired a prescriptive easement to enter the land trust defendants' property for the purpose of maintaining an approach slope to the runway. We also conclude that the trial court properly determined that the airport defendants had no right under the prescriptive easement to clear-cut the land trust defendants' property.

We first address the issue of whether the airport defendants have a prescriptive clearance easement in the land trust defendants' properties and, if so, the scope and purpose of the easement. We conclude that the trial court properly determined that the airport defendants have a prescriptive easement to maintain an approach slope over the land trust defendants' property.

The distinction between an avigation easement and a clearance easement was discussed in *United States v. Brondum*, 272 F.2d 642 (5th Cir. 1959). An avigation easement "permits free flights over the land in question. It provides not just for flights in the air as a public highway-in that sense no easement would be necessary; it provides for flights that may be so low and so frequent as to amount to a taking of the property." (Internal quotation marks omitted.) *Id.*, at 645; see also *Griggs v. Allegheny County*, 369 U.S. 84, 88-89, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962) (definition of navigable airspace in 49 U.S.C. § 40102[a][30], formerly 49 U.S.C. § 1301 [24], includes airspace required for airplanes to

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privilege, of his intention to dispute the right-of-way or other easement and to prevent the other party from acquiring the right; and the notice, being served and recorded as provided in sections 47-39 and 47-40, shall be deemed an interruption of the use and shall prevent the acquiring of a right thereto by the continuance of the use for any length of time thereafter."

land and takeoff safely, but interference with use and enjoyment of neighboring land due to low flights amounts to constitutional taking and entitles landowners to compensation). By contrast, a clearance easement provides the "right to cut trees and natural growth to a prescribed height and to remove man-made obstructions above a prescribed height." *United States v. Brondum*, supra, at 644. "The interest acquired has but one function . . . and that is to serve as the ceiling over the land in question beyond which obstructions or structures may not be allowed to extend upward into the adjacent air space." (Internal quotation marks omitted.) *Id.*, at 644-45 n. 5; see also *Melillo v. New Haven*, 249 Conn. 138, 143 n.11, 732 A.2d 133 (1999).

The status of both prescriptive avigation easements and prescriptive clearance easements is unsettled under Connecticut law. See *Westchester v. Commissioner of Transportation*, 9 F.3d 242, 245 (2d Cir. 1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2102, 128 L. Ed. 2d 664 (1994). In *Westchester v. Greenwich*, 227 Conn. 495, 498-500, 629 A.2d 1084 (1993), the plaintiff, a New York municipal corporation that owned and operated the Westchester County Airport, had initiated an action in the United States District Court for the Southern District of New York against the defendants, the town of Greenwich and several residents of the town, claiming a prescriptive avigation easement in the airspace over the defendants' properties and seeking an injunction against the defendants authorizing the plaintiff to trim or cut down trees on the properties that had penetrated the airport's flight zone. The United States Court of Appeals for the Second Circuit certified the following questions to this court: "1. Can an avigation easement be acquired by prescription in the State of Connecticut?

"2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?

"3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever air space is necessary to use the easement?" (Internal quotation marks omitted.) *Id.*, at 497 n.2, 629 A.2d 1084. Because we concluded that, under the facts and circumstances of the case, the plaintiff could not establish a prescriptive avigation easement, we declined to answer the certified questions. *Id.*, at 502, 504, 629 A.2d 1084.

In making that determination, we recognized that, in order to establish a prescriptive avigation or clearance easement, the party claiming the easement must meet the requirements of state law that "the use be adverse. It must be such as to give a right of action in favor of the party against whom it has been exercised .... In order to prove such adverse use, the party claiming to have acquired an easement by prescription must demonstrate that the use of the property has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." (Citation omitted; internal quotation marks omitted.) *Id.*, at 501, 629 A.2d 1084. "A use by express or implied permission or license cannot ripen into an easement by prescription." (Internal quotation marks omitted.) *Id.* We concluded that the plaintiff could not establish that its use of the airspace gave a right of action in favor of the defendants, thereby giving rise to a prescriptive easement, because: (1) "[t]he defendants... had no right of action against the plaintiff to stop the overflights because federal law prohibits landowners from obtaining injunctive relief against aircraft using the navigable airspace of the United States"; *id.*, at 502, 629 A.2d 1084; and (2) although the defendants had a right "to seek compensation from the plaintiff for aircraft flights so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land"; (internal quotation marks omitted) *id.*, at 503, 629 A.2d 1084;

here was no evidence of such interference in the case. *Id.*, at 504, 629 A.2d 1084.

In the present case, unlike in *Westchester v. Greenwich*, supra, 227 Conn. 495, 629 A.2d 1084, it is clear that the conduct that the airport defendants claim gave rise to a prescriptive clearance easement constituted a "direct and immediate interference with the [land trust defendants'] enjoyment and use of the land" entitling them to seek compensation; (internal quotation marks omitted) *id.*, at 503, 629 A.2d 1084; and, therefore, the use was adverse. Cf. *id.*, at 504, 629 A.2d 1084 (plaintiff could not establish that it had prescriptive easement because it failed to establish that overflights had harmed defendants' trees); see also *Drennen v. Ventura*, 38 Cal. App. 3d 84, 86-87 n.2, 112 Cal. Rptr. 907 (1974) (that which may be acquired by exercise of power of eminent domain should be subject to acquisition by prescription). Accordingly, we conclude that the airport defendants' use of the land trust defendants' properties could give rise to a prescriptive clearance easement if the other requirements for a prescriptive easement are met.

There is no dispute in this case that the airport defendants' use of the land trust defendants' property was "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." (Internal quotation marks omitted.) *Westchester v. Greenwich*, supra, 227 Conn. at 501, 629 A.2d 1084. The land trust defendants claim, however, that the trial court improperly found that the airport defendants had a prescriptive easement because: (1) the airport defendants failed to meet their burden of establishing the scope of the easement; and (2) the existence of a boundary line agreement prevented the airport defendants from acquiring a prescriptive easement. We address each of those claims in turn.

A

The following additional facts are relevant to the resolution of the land trust defendants' claim that the airport defendants failed to meet their burden of establishing the scope of the easement. Arthur D'Onofrio, a previous owner of the airport, testified at trial that, between 1979 and 1999, trees located within the 2.5 acres at issue in the present case were periodically trimmed or removed. The cuttings took place approximately every four or five years. The trees usually were trimmed or removed in response to complaints from pilots that the trees were protruding into the airspace and becoming a safety hazard. D'Onofrio testified that the procedure for trimming the trees was not "very scientific. Basically, [he] sent people in there with chainsaws and they cut down whatever . . . trees they thought were in the way of the approach." Shrubs were also removed in order to provide access to the trees. The cutting area was approximately 100 to 150 feet wide and was centered on the center line of the runway. Landing area inspection reports showed that, in 1981, the runway operated with a fourteen to one approach slope;[21] in 1983, it operated with a thirteen to one approach slope; in 1984 and 1985, it operated with a nineteen to one approach slope with a displaced threshold of 340 feet;[22] in 1986, it operated with a twenty to one slope with a displaced threshold of 340 feet; in 1987 and 1988, it operated with a twenty to one slope with a

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[21] In other words, for every fourteen feet that the approach slope advanced horizontally, it rose one vertical foot.

[22] When an approach slope is steeper than the twenty to one ratio required by Federal Aviation Administration regulations; see footnote 15 of this opinion; the permissible landing point is shifted from the end of the runway to a point where the twenty to one approach slope is achieved. This point is known as a "displaced threshold." In such cases, the approach slope is calculated with reference to the displaced threshold.

displaced threshold of 150 feet; in 1993, it operated with a fourteen to one approach slope; and in 1997, it operated with a thirteen to one approach slope.

On the basis of this evidence, the trial court determined that the airport defendants had acquired a prescriptive easement to enter the land trust defendants' property to trim and cut trees growing in the 2.5 acres at issue for the purpose of removing obstacles in the runway takeoff and landing corridors. After the trial court issued its memorandum of decision, the land trust defendants filed a motion for articulation requesting that the trial court provide the precise boundaries of the easement. The trial court denied the motion, stating that "[t]he memorandum of decision specified the extent of the prescriptive easement as particularly as possible under the circumstances of this case."

The land trust defendants claim that the trial court improperly found that the airport defendants had established a prescriptive easement because the easement "must be defined in terms of height, in addition to the more traditional length and width of a pathway" and because the evidence showed that "there has been no uninterrupted fifteen year period in which the airport maintained anything resembling a consistent glide path." We disagree.

"[A] prescriptive right extends only to the portion of the servient estate actually used . . . and is circumscribed by the manner of its use . . . . A prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty." (Citations omitted.) *Kaiko v. Dolinger*, 184 Conn. 509, 510-11, 440 A.2d 198 (1981); see also *Schulz v. Syvertsen*, 219 Conn. 81, 92, 591 A.2d 804 (1991). The boundaries of a prescriptive easement need not be described by metes and bounds if the character of the land makes such precise description impossible. *McCullough v. Waterfront Park Assn.*,

Inc., 32 Conn. App. 746, 759, 630 A.2d 1372, cert. denied, 227 Conn. 933, 632 A.2d 707 (1993).[23]

The burden is on the party claiming a prescriptive easement to prove all of the elements by a preponderance of the evidence. *Schulz v. Syvertsen*, supra, 219 Conn. at 91, 591 A.2d 804. "Whether the requirements for such a right have been met in a particular case presents a question of fact for the trier of facts . . . . In such cases, the trier's determination of fact will be disturbed only in the clearest of circumstances, where its conclusion could not reasonably be reached." (Citations omitted; internal quotation marks omitted.) *Robert S. Weiss & Co. v. Mullins*, 196 Conn. 614, 618-19, 495 A.2d 1006 (1985).

The only issue in the present case is whether the vertical dimensions of the prescriptive easement claimed by the

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[23] See also *O'Brien v. Hamilton*, 15 Mass. App. 960, 962, 446 N.E.2d 730 (extent of easement gained by prescription for successive owners of dominant land must be measured by general pattern formed by adverse use), appeal denied, 389 Mass. 1102, 448 N.E.2d 767 (1983); *Alvin v. Johnson*, 245 Minn. 322, 323 n.2, 71 N.W.2d 667 (1955) (court's description of prescriptive easement as " 'width for reasonable use' " was not "so devoid of description as to be totally unenforceable"); *Silverstein v. Byers*, 114 N.M. 745, 749, 845 P.2d 839 (1992) (one-quarter mile deviation in route of roadway did not defeat claim to prescriptive easement, especially when divergence was not voluntary act of person claiming right but was due to circumstances beyond his control), *cert. denied*, 115 N.M. 60, 846 P.2d 1069 (1993); *Concerned Citizens v. Holden Beach Enterprises, Inc.*, 329 N.C. 37, 47, 404 S.E.2d 677 (1991) (deviations in line of travel do not necessarily preclude finding of substantial identity of prescriptive easement if character of land prevents confinement of path to definite and specific line); *Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 157, 559 A.2d 1068 (1989) ("the use under which a prescriptive easement arises determines the general outlines rather than the minute details of the interest" [emphasis in original; internal quotation marks omitted]), quoting 5 Restatement, Property § 477, comment b, (1944).

airport defendants were sufficiently defined. During the years that the approach slope was measured without a displaced threshold, it ranged from thirteen to one to fourteen to one. During the years that the approach slope was measured with reference to a displaced threshold of 340 feet, it ranged from nineteen to one to twenty to one. Our calculations show that these slopes are relatively consistent with the thirteen to one and fourteen to one approach slopes measured with reference to the end of the runway.[24]

In light of the type of use at issue, we conclude that the variations in the angle of the approach slope maintained by the airport defendants did not prevent them from acquiring a prescriptive easement. First, trees grow. It is clear, therefore, that it would be virtually impossible to maintain an absolutely uniform slope over the course of time. Second, a very localized and relatively small change in the topography of the vegetation could cause a major change in

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[24] If a 340 foot displaced threshold is used and a uniform slope of vegetation and the absence of obstacles south of the conservancy's property are assumed, a 14 to 1 approach slope becomes approximately an 18 to 1 approach slope (the distance from the end of the runway to Chapman Pond, 1100 feet, divided by 14 is 78.57 feet, the presumptive height of the approach slope at Chapman Pond; the distance from the displaced threshold to Chapman Pond, 1440 feet, divided by 78.57 is approximately 18); using the same form of calculation, a 13 to 1 approach slope becomes approximately a 17 to 1 approach slope; and a 20 to 1 approach slope with a 150 foot displaced threshold becomes approximately a 23 to 1 approach slope. Thus, over the course of 18 years, the approach slope ranged from approximately 17 to 1 with a 340 foot displaced threshold to 23 to 1 with a 340 foot displaced threshold. We recognize that this calculation is somewhat rough. It is reasonable to conclude, however, that, because the runway had an approach slope ranging from 14 to 1 to 13 to 1 both before and after the 10 years in which the approach slope was calculated in reference to a displaced threshold, the approach slope during those 10 years was not radically different.

the approach slope. For example, a sudden growth spurt in a single tree near the border between the land trust and airport properties could cause the approach slope to become much steeper in a short period of time. Third, although the angle of the approach slope changed from year to year, it appears to have stayed within a relatively narrow range centering around twenty to one with a 340 foot displaced threshold. See footnote 24 of this opinion. Finally, although D'Onofrio testified that he would both trim and cut down trees that protruded into the airspace, the purpose of the easement was to maintain a maximum tree height over the land, not to eliminate the trees altogether, and that was the actual result of the airport defendants' use of the property. See *United States v. Brondum*, supra, 272 F.2d at 644-45 n.5. Accordingly, we conclude that the cutting of a tree when the trimming of the tree would have been sufficient to maintain the ceiling was a deviation from the easement and neither destroyed it nor created a prescriptive right to cut trees to the ground when trimming them would suffice. See footnote 23 of this opinion; cf. *Kuras v. Kope*, 205 Conn. 332, 341, 533 A.2d 1202 (1987) ("[t]he use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit" [internal quotation marks omitted]). In summary, we conclude that the trial court's determination that the dimensions of the easement were defined with sufficient certainty to be enforceable was not clearly erroneous, given the nature of the claimed prescriptive easement.

B

We next address the land trust defendants' claims that the trial court improperly determined that the airport defendants had acquired a prescriptive easement in their properties because the existence of a boundary line agreement between the predecessors in title to the airport

and the land trust prevented the airport from obtaining a prescriptive easement pursuant to § 47-38.[25] We disagree.

The following additional facts are relevant to our resolution of this claim. On December 3, 1970, Edward Vynalek and Dorothy Vynalek (collectively, the Vynaleks), predecessor landowners to the land trust, and William H. Bradway and Ruth E. Bradway (collectively, the Bradways), predecessor landowners to the airport, entered into a boundary line agreement. The purpose of the agreement was to resolve a dispute over the location of the boundary between their properties by making the boundary the center of the tidal creek. The agreement provided that "the said BRADWAYS do hereby remise, release, and forever QUIT-CLAIM unto the said VYNALEKS, their heirs and assigns forever, all the right, title, interest, claim and demand whatsoever as the said BRADWAYS have or ought to have in or to the lands situated generally south of said division line between the lands of the parties herein TO HAVE AND TO HOLD the said premises unto the said VYNALEKS, their heirs and assigns forever, so that the said BRADWAYS, their heirs nor any other person shall hereafter have any claim, right or title in or to the said premises, or any part thereof and they are by these presents forever barred and excluded therefrom." The trial court concluded that the agreement did not prevent the airport defendants from

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[25] The land trust defendants also point to a letter dated June 7, 1978, from the airport operator at the time to the Connecticut bureau of aeronautics. The operator stated that he was in the process of obtaining permission to remove or trim trees on the land to the south of the airport property in order to reduce the approach slope. The land trust defendants argue that this letter defeats any claim that the airport defendants trimmed and removed trees from their property under a claim of right, but they point to no evidence that the airport or its predecessors actually obtained permission to enter the land. Accordingly, we reject this claim.

acquiring a prescriptive easement in the land trust's property because, although "entering the [land trust defendants'] land may contravene the rights to exclusive possession conveyed by the boundary agreement, every prescriptive easement is similarly acquired."

The land trust defendants argue that the trial court improperly failed to recognize that the agreement constituted notice, under § 47-38, of the land trust's intention to prevent the airport defendants from acquiring a prescriptive easement. In support of this argument, they rely primarily on this court's decision in *Crandall v. Gould*, 244 Conn. 583, 711 A.2d 682 (1998). In that case, "[t]he plaintiffs . . . [owned] property located at 283 River Road in the town of Stonington. The defendants . . . [owned] property, including a [private way], that [abutted] the property owned by the plaintiffs.

"A fence was constructed along the [private way] in 1960. In 1960 . . . the defendants' [predecessor] in title, obtained a permanent injunction . . . against . . . a plaintiff in [the] action, enjoining him, his servants and agents from interfering with [the predecessor's] use and enjoyment of said right-of-way . . . ." (Internal quotation marks omitted.) *Id.*, at 585-86, 711 A.2d 682.

"In 1964, the plaintiffs removed a section of the fence. The plaintiffs used the front portion of the [private way] to the opening of the fence as a means of gaining vehicular access to their property from River Road." (Internal quotation marks omitted.) *Id.*, at 586, 711 A.2d 682. Thereafter, the plaintiffs commenced an action seeking to enjoin the defendants from interfering with their use of the private way. *Id.* The trial court concluded that, because the plaintiffs had been permanently enjoined from using the private way, they did not have a claim of right to use it and, therefore, could not establish an easement by prescription. *Id.*, at 585-86, 711 A.2d 682.

On appeal, this court agreed with the trial court that the plaintiffs had violated the permanent injunction issued by the trial court in 1960 by using the private way. *Id.*, at 589, 711 A.2d 682. We further concluded that, although the plaintiffs' use of the private way was not permissive and was made without any recognition of the defendants' rights to prevent it and, therefore, ordinarily would have established that the plaintiffs had acted under a claim of right, the existence of the permanent injunction precluded the plaintiffs from acquiring a prescriptive easement. *Id.*, at 591-93, 711 A.2d 682. In support of this conclusion, we stated that, under § 47-38, when formal notice of intent to prevent another party from acquiring an easement has been provided, no such easement may be acquired. *Id.*, at 593-94, 711 A.2d 682. We further stated that "a party that obtains a permanent injunction [against a particular use] necessarily will have served notice on the opposing party that will very nearly conform to the requirements of § 47-38 and, in fact, may be superior to that contemplated by § 47-38 . . . ." *Id.*, at 594, 711 A.2d 682.

We conclude that the present case is distinguishable from *Crandall*. In *Crandall*, the injunction issued by the trial court in 1960 had been sought and was issued for the express purpose of prohibiting the plaintiffs from using the private way as an easement. In the present case, the purpose of the boundary line agreement was to resolve a property line dispute. The language of the agreement providing that neither the "BRADWAYS, their heirs nor any other person shall hereafter have any claim, right or title in or to the [Vynaleks'] premises, or any part thereof and they are by these presents forever barred and excluded therefrom" was intended merely to recognize that the Bradways had agreed to disavow any property interest in any formerly disputed land on the Vynaleks' side of the newly agreed upon property line and that their successors would have no such interest by virtue of anything that had

occurred up to the date of the agreement. Nothing in the agreement suggests that the Vynaleks were aware of any past use or anticipated any future use, for any purpose, of the portion of their land that had not been in dispute or that they intended to forestall the acquisition of a prescriptive easement in the land. We conclude, therefore, that the trial court properly determined that the boundary line agreement did not constitute notice of intent to prevent the airport defendants from acquiring an easement under § 47-38 and, therefore, did not prevent the airport defendants from acquiring a prescriptive easement in the land trust defendants' properties.

C

We next turn our attention to the trial court's determination that the airport defendants exceeded the scope of the prescriptive easement by clear-cutting the land trust defendants' properties. We note that the airport defendants do not challenge that determination on appeal.[26]

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[26] As we have indicated, the vertical dimensions of the easement varied within a relatively narrow range centered around a twenty to one slope with a 340 foot displaced threshold. As we have also indicated, when the airport defendants clear-cut the land, some of the trees within the easement were up to seventy-two feet high. It is clear, therefore, that it was not reasonably necessary to clear-cut the trees to maintain an approach slope within the specified ranges. See *Gioielli v. Mallard Cove Condominium Assn., Inc.*, 37 Conn. App. 822, 831-32, 658 A.2d 134 (1995) ("[W]hen an easement is established by prescription, the common and ordinary use which establishes the right also limits and qualifies it. . . . The use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit."); see also *Zhang v. Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 637, 866 A.2d 588 (2005) ("[s]ubject to the proviso that the servitude beneficiary is not entitled to cause unreasonable damages to the servient estate, or interfere unreasonably with its enjoyment . . . the beneficiary of an easement [may] make any use of the servient estate that is

Rather, their position appears to be that once they have established any property right in the land trust defendants' lands, no matter how limited, federal law preempts all of the landowners' residual property rights and all state and local land use laws limiting those rights. As we have indicated, however, the airport defendants conceded at oral argument before this court that, in the absence of any state law property right to enter the land trust defendants' properties for the purpose of trimming and cutting trees, federal law would confer no such right. We cannot perceive why, if federal law would confer no right to enter the land trust defendants' properties in the absence of a property right to do so, federal law would trump all residual private property rights of the landowner and state as well as state and local land use laws where the airport defendants established only a limited property right. If the airport defendants had no cause of action against the land trust defendants to require them to clear-cut the land under federal law; see *Westchester v. Greenwich*, supra, 745 F. Supp. at 955; they had no right under federal law to conduct such an activity themselves. Accordingly, we conclude that, under the airport defendants' own reasoning, they had no right under federal law to clear-cut the trees in the absence of a right to do so

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reasonably necessary for the convenient enjoyment of the servitude for its intended purpose"). Moreover, if the clear-cutting had occurred during the prescriptive period, it presumably would have provoked the same reaction from the land trust defendants as it did in the present circumstances. See *McCullough v. Waterfront Park Assn., Inc.*, supra, 32 Conn. App. at 756, 630 A.2d 1372 ("[a]n unreasonable increase in burden is such a one as it is reasonable to assume would have provoked the owner of the land being used to interrupt the use had the increase occurred during the prescriptive period"). Accordingly, even if the airport defendants had challenged the trial court's determination that the clear-cutting exceeded the scope of the prescriptive easement, we would conclude that that determination was not clearly erroneous.

under state property law.[27] In light of the trial court's unchallenged determination that the airport defendants had no such property right, we conclude that we need not address their claim that, if they had such a right, federal law would preempt the application of local land use law.[28] We conclude, therefore, that in the absence of any right under state property law to clear-cut the trees, state and local laws regulating activity within wetlands and watercourses applied to the airport defendants' conduct.

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[27] It seems somewhat counterintuitive that federal aviation law might preempt state and local law governing the use of real property even though it does not preempt state property law. There is some precedent for that proposition, however. See *National Aviation v. Hayward*, 418 F. Supp. 417, 424-25 (N.D. Cal. 1976) (exercise of municipal police power to regulate aircraft noise is preempted by federal law but right of municipal proprietor of airport to determine permissible noise level is not preempted). It is implicit in *National Aviation* that, although neighboring landowners could seek compensation if airport noise interfered with the use and enjoyment of their property, if a municipal airport proprietor obtained noise easements from the landowners, state and local governments could not regulate noise levels. See *id.*, at 421. As we have indicated, however, we need not consider in the present case the extent to which the principles cited in *National Aviation* apply to privately owned airports and prescriptive clearance easements because the airport defendants have not established that they have a property right to clear-cut the land trust defendants' trees.

[28] We note that the plaintiffs do not claim that the type of activities allowed by the prescriptive easement would violate state or local land use regulations. Accordingly, we need not consider whether federal law would preempt local regulations with respect to those activities. Nor need we consider the plaintiffs' alternate ground for affirmance that, in the absence of any factual foundation that the airport defendants had initiated proceedings with the Federal Aviation Administration to identify and eliminate obstructions on the land trust defendants' property, there was no factual predicate for the airport defendants' claim of preemption.

II

We next address the airport defendants' claim that, even if we conclude that federal law did not preempt the application of state and local wetlands regulations to their conduct, the trial court improperly rendered judgment for the land trust defendants on their cross claim that cutting the trees constituted unreasonable pollution under § 22a-16 because the claim was predicated on the airport defendants' failure to obtain a permit pursuant to the Inland Wetlands and Watercourses Act (act), General Statutes § 22a-28 et seq., and, therefore, could not form the basis for a claim under § 22a-16. We disagree.

The following additional procedural history is relevant tc our resolution of this claim. In the sixth count of their cross claim against the airport defendants, the land trust defendants claimed that the clear-cutting of their land had "removed a natural buffer that existed between Chapman Pond and any [a]irport disturbances, threaten[ed] the integrity of Chapman Pond and the lower Connecticut River Watershed, and involve[d] conduct which has, or is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in Chapman Pond by increasing noise pollution and other destruction and impairment of wetlands, watercourses and other environmentally sensitive habitats in breach of the public trust. For example, the stream that these trees helped to shade and retain has a documented population of wild brook trout and the removal of the shade trees will adversely affect the stream water quality, temperature, and habitat. The trees also served to buffer Chapman Pond's breeding waterfowl and wintering bald eagle habitat from the airport." (Internal quotation marks omitted.)

The trial court found that the "clear-cutting was unreasonable under all of the circumstances. In the past, only trimming and selective cutting of trees was employed to remove such obstacles to air navigation, which the

growing trees created. There existed no sound reason to abandon that conservative practice. To sever every tree and woody-stemmed bush, regardless of height and species, destroyed important floodplain forest excessively and unnecessarily." Accordingly, the court rendered judgment for the land trust defendants on the sixth count of their cross claim.

The airport defendants argue that the sixth count of the land trust defendants' cross claim was duplicative of the first count of the commissioner of environmental protection's complaint in the companion case of *Rocque v. Mellon*, 275 Conn. at 161, 167-69, 881 A.2d 972 (2005), in which the commissioner alleged that the airport defendants had violated § 22a-16 by failing to obtain a permit as required by § 22a-42a (c)(1). See footnote 3 of this opinion. The trial court concluded in that case that the commissioner could not prevail on its claim because, under this court's decision in *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 138-48, 836 A.2d 414 (2003), "the failure to obtain a license or permit to engage in conduct which impinges on the environment cannot form the basis for a . . . claim under § 22a-16." The airport defendants argue that, in the present case, the trial court should have dismissed the land trust defendants' claim under § 22a-16 for the same reason. We note that, in the companion case, we reversed the trial court's dismissal of the first count of the commissioner's complaint and remanded the case with direction to render judgment in favor of the commissioner on that count. *Rocque v. Mellon*, supra, at 169-70, 881 A.2d 972. For similar reasons, we conclude in the present case that the trial court properly rendered judgment for the land trust defendants on the sixth count of their complaint.

Because the airport defendants' claim implicates the standing of the land trust defendants to raise a claim under § 22a-16, it necessarily implicates the trial court's subject matter jurisdiction over the claim. See *Connecticut Coalition*

Against Millstone v. Rocque, supra, 267 Conn. at 127-28, 836 A.2d 414. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Id.*

In *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. 116-18, 134, 836 A.2d 414, the plaintiffs, environmental activists, claimed that the Millstone Nuclear Power Generating Station should be enjoined from operating because it was functioning under an improperly issued permit. We determined that "[a]llegations of improper decisions by the commissioner for failure to comply with the statutory requirements regarding permit renewal proceedings and emergency authorizations cannot be construed as anything other than a licensing claim under [General Statutes] § 22a-430." *Id.*, at 134, 836 A.2d 414. Relying on a long series of cases in which we had held that § 22a-16 does not confer standing to litigate decisions regarding permits that are within the exclusive jurisdiction of a state agency, we concluded that the trial court properly had dismissed the plaintiffs' claims. *Id.*, at 129-38, 836 A.2d 414. In doing so, we distinguished other cases in which we had determined that the plaintiffs had standing under § 22a-16 because, although the lack of an appropriate permit had been alleged, the plaintiffs had raised independent "claims of unreasonable pollution [that] were directed primarily to the polluting activity itself, and not . . . to the validity of an existing permit or authorization . . . ." *Id.*, at 139-40, 836 A.2d 414, citing *Keeney v. Old Saybrook*, 237 Conn. 135, 140-41, 676 A.2d 795 (1996) (alleging unreasonable pollution of state waters from town's failure to comply with pollution abatement orders); *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co.*, 227 Conn. 175, 190, 629 A.2d 1116 (1993) (alleging unreasonable pollution from

failure to obtain permit for operation of solid waste facility that generated leachate, which degraded groundwater); *Keeney v. L & S Construction*, 226 Conn. 205, 209, 626 A.2d 1299 (1993) (alleging unreasonable pollution from depositing construction debris in close proximity to area water supply without permit).

In the present case, unlike in *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. at 139, 836 A.2d 414, the land trust defendants make no claim that the clear-cutting of their properties constituted unreasonable pollution because the airport defendants had failed to obtain a wetlands permit. Indeed, their cross claim makes no reference to the need for a permit at all.[29] Instead, their claim was "directed primarily to the polluting activity itself . . . ." Accordingly, we conclude that the trial court properly rejected the airport defendants' claim that the land trust defendants lacked standing to raise this cross claim.

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[29] We conclude elsewhere in this opinion that the clear-cutting constituted a regulated activity for which a permit was required. See part III of this opinion. In *Waterbury v. Washington*, 260 Conn. 506, 557, 800 A.2d 1102 (2002), we held that "when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under [§ 22a-16], whether the conduct is unreasonable under [§ 22a-16] will depend on whether it complies with that scheme." We need not consider, however, whether the plaintiffs would have issued a wetlands permit for clear-cutting the land if an application for a permit had been submitted because we have concluded in part I of this opinion that the airport defendants had no rights in the property that would have entitled them to submit such an application. In the absence of any such right, the airport defendants' conduct necessarily would not have been permitted. Accordingly, we conclude that the trial court properly determined that "[t]o sever every tree and woody-stemmed bush, regardless of height and species, destroyed important floodplain forest excessively and unnecessarily," and was, therefore, unreasonable.

III

We next address the airport defendants' claim that the trial court improperly rendered judgment for the plaintiffs on their claim that the airport defendants violated the act by failing to obtain a permit to clear-cut the land trust defendants' properties. They argue that the removal of vegetation from the properties was not a regulated activity under the act because it did not disturb any wetlands soils. We disagree.

The trial court found that "[t]he floodplain forest which was clear-cut comprised diverse species of hardwood trees and woody shrubs. . . . [A]round 340 trees and tree sprouts were severed on land trust property and a few more on conservancy land. These trees acted as a flood brake, slowing the velocity of the occasional floodwaters of the Connecticut River which regularly spill into the floodplains and eventually into Chapman's Pond. The slower the flow of floodwater, the less erosion, scouring, and damage to the submerged land and water bodies is done. The taller and denser the floodplain forest, the greater the buffering capacity to slow floodwaters. Undoubtedly, the felling of all trees and woody vegetation over 2.5 acres in the midst of a floodplain corridor between the Connecticut River and Chapman's Pond altered that wetlands and the abutting floodplains and wetlands." Accordingly, the trial court concluded that the airport defendants had violated § 22a-42a (c)(1) of the act and were liable for damages of $17,500 under § 22a-44 (b).

We first address the standard of review. "Whether the trial court properly concluded that the commission had jurisdiction over the activities proposed by the plaintiff involves a legal question involving statutory interpretation, over which our review is plenary." *AvalonBay Communities, Inc. v. Inland Wetlands Commission*, 266 Conn. 150, 158, 832 A.2d 1 (2003).

We begin with the language of the statute. General Statutes § 22a-38 (13) defines " '[r]egulated activity' " as "any operation within or use of a wetland or watercourse involving rer..oval or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses . . . ." Thus, the definition expressly includes operations "involving removal or deposition of material" in wetlands areas. In the present case, the airport defendants removed the living vegetation canopy growing over the wetlands and deposited the woody remains on the ground.[30] If the removal of all vegetation growing in a wetlands area was not intended to be a regulated activity, we would be hard pressed to imagine what type of material the legislature had in mind in enacting § 22a-38 (13). Accordingly, we conclude that the clear-cutting was a regulated activity.

The airport defendants argue, however, that our opinion in *AvalonBay Communities, Inc. v. Inland Wetlands Commission*, supra, 266 Conn. 150, 832 A.2d 1, supports their claim that the clear-cutting of the land trust defendants' land was not a regulated activity. In that case, the plaintiff appealed to the trial court after the defendant inland wetlands commission had denied its application for an inland wetlands permit. *Id.*, at 152, 832 A.2d 1. The trial court dismissed the appeal and the plaintiff appealed to this court, claiming that the denial was improper because its

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[30] Brian Golembiewski, an environmental analyst with the inland water resources division of the bureau of water management and the department of environmental protection, appeared at trial as the plaintiffs' expert witness. He testified that, "[u]nfortunately, all of this woody material has been left in place, so even . . . where you would have sunlight and you'd have . . . herbaceous or soft-stemmed short plants that would now have sunlight that they didn't have prior . . . [that] could grow and establish, that would even be somewhat limited by this blanket of woody materials left out there."

proposed construction activities would not take place within any wetlands, watercourses or wetlands buffer area. *Id.* The defendant argued that the act was intended not only to protect the wetlands from physical damage or intrusion, but to protect wildlife and biodiversity both within and outside the borders of the wetlands. *Id.*, at 156-57, 832 A.2d 1. We noted that § 22a-38(15) defined wetlands as "land, including submerged land . . . which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and floodplain . . . ." (Emphasis in original; internal quotation marks omitted.) *Id.*, at 162, 832 A.2d 1. We determined that, although an "inland wetlands commission may regulate activities taking place outside the wetlands boundaries and upland review [buffer] areas if such activities are likely to have an impact or effect on the wetlands themselves"; *id.*, at 161, 832 A.2d 1; "the act protects [only] the physical characteristics of wetlands and watercourses and not the wildlife, including wetland obligate species, or biodiversity." *Id.*, at 163, 832 A.2d 1. Accordingly, we concluded that the plaintiff's proposed construction activities did not require the issuance of a regulated activity permit.[31] *Id.*, at 171, 832 A.2d 1.

We conclude that the airport defendants read *AvalonBay Communities, Inc.*, too broadly when they argue that

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[31] The legislature responded to our ruling in *AvalonBay Communities, Inc.*, by enacting No. 04-209 of the 2004 Public Acts, now codified at General Statutes § 22a-41 (c), which provides: "For purposes of this section, (1) 'wetlands or watercourses' includes aquatic, plant or animal life and habitats in wetlands or watercourses, and (2) 'habitats' means areas or environments in which an organism or biological population normally lives or occurs." The plaintiffs argue that this amendment is retroactive because it was intended to clarify that clear-cutting of vegetation within a wetlands is a regulated activity. We need not reach this claim because we conclude that the airport defendants conduct was a regulated activity under the version of the statute in place at the time that the activity took place.

activities that affect the vegetation growing within a wetlands but that do not disturb the soil cannot be regulated. Nothing in that case suggests that the act's definition of the term wetlands was intended to exclude vegetation growing within the wetlands, and we perceive no reason to conclude in the present case that the legislature had any such intention. In ordinary usage, the word "land" includes things growing on the land. See Black's Law Dictionary (4th Ed. Rev. 1968) (" '[l]and' includes not only the soil or earth, but also things of a permanent nature affixed thereto or found therein, [including] water, trees, grass, herbage, other natural or perennial products, growing crops or trees [and] mineral under the surface"). In any event, the trial court expressly concluded that the airport defendants' activities would result in damage to the soils themselves as a result of increased "erosion [and] scouring . . . [of] the submerged land and water bodies . . . ." That factual finding was supported by the court's finding that the land was in a floodplain and that a taller and denser vegetation cover would prevent such damage by slowing floodwaters.[32] Accordingly, we reject this claim and affirm the trial court's determination that the clear-cutting was a regulated activity.

IV

We next address the airport defendants' claim that the trial court improperly determined that Mellon was personally liable for clear-cutting the trees on the land trust defendants' property. We disagree.

The following additional procedural history is relevant to our resolution of this claim. At trial, Evans testified that Mellon instructed him to cut "everything" within the 2.5 acres. Mellon testified that he directed Evans to cut all of the trees within the approach slope. Mellon did not

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[32] That finding was, in turn, supported by the trial testimony of Brian Golembiewski, the plaintiffs' expert witness.

specifically recall instructing Evans to cut shrubs, but stated that he took "responsibility for whatever [Evans] cut," and that everything that Evans did was under Mellon's authority.

During trial, the airport defendants filed a motion to dismiss the claims against Mellon personally on the ground that the plaintiffs and the land trust defendants had not established a prima facie case that he had acted in his individual capacity and not merely as a corporate officer of the airport. The trial court denied the motion. In its memorandum of decision, the court found that, "[b]etween November 29 and December 5, 2000, at the direction of Mellon, the owner of the airport, Evans, an independent contractor, clear-cut approximately 2.5 acres of floodplain forest located on land owned by the land trust and land owned by the conservancy." The court rendered judgment against the airport defendants on the plaintiffs' claims pursuant to § 22a-44 (a) and found the airport defendants jointly and severally liable for a civil penalty of $17,500 pursuant to § 22a-44 (b). The court also rendered judgment in favor of the land trust defendants on their claim pursuant to § 22a-16 and, pursuant to § 22a-16a, ordered the airport defendants to make a financial contribution of $50,000 to "an academic or government-funded research project related to environmental protection or conservation of natural resources, which recipient will be identified by the [department of environmental protection]."

It is well established that "an officer of a corporation does not incur personal liability for its torts merely because of his official position. Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby." *Scribner v. O'Brien, Inc.*, 169 Conn. 389, 404, 363 A.2d 160 (1975); see also *Kilduff v. Adams, Inc.*, 219 Conn. 314, 331-32, 593 A.2d 478 (1991) ("[i]t is black letter law that an officer of a corporation who

commits a tort is personally liable to the victim regardless of whether the corporation itself is liable"). "Thus, a director or officer who commits the tort or who directs the tortious act done, or participates or operates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for the tort." 18B Am. Jur. 2d 607, Corporations § 1629 (2004).

Because the issue of whether a corporate officer has committed or participated in the wrongful conduct of a corporation is a question of fact, it is subject to the clearly erroneous standard of review. See *Sargent v. Smith*, 272 Conn. 722, 728, 865 A.2d 1129 (2005). "[A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Id.*, at 728-29, 865 A.2d 1129.

We conclude in the present case that the trial court's determination that Mellon personally directed Evans to clear-cut the trees is amply supported by the record. Accordingly, we conclude that the trial court properly determined that Mellon was personally liable for cutting the trees under §§ 22a-44 (b) and 22a-16a. See *Scribner v. O'Brien, Inc.*, supra, 169 Conn. at 404, 363 A.2d 160. It is immaterial whether Mellon was acting in his individual capacity or on behalf of the corporation. See *id.*

Mellon makes two arguments in support of his claim to the contrary. First, he argues that his conduct did not fall within the responsible corporate officer doctrine adopted by this court in *BEC Corp. v. Dept. of Environmental Protection*, 256 Conn. 602, 618, 775 A.2d 928 (2001). Second, he argues that the application of *Scribner v. O'Brien, Inc.*, supra, 169 Conn. 389, 363 A.2d 160, to limited liability companies has

been superseded by General Statutes § 34-134.[33] We reject both arguments.

In *BEC Corp. v. Dept. of Environmental Protection*, supra, 256 Conn. 602, 775 A.2d 928, this court considered whether officers of the plaintiff corporation could be held personally liable under the Connecticut Water Pollution Control Act, General Statutes § 22a-416 et seq., for pollution caused by the corporation. We concluded that because General Statutes § 22a-432 defined "person" under the act to include "any officer" of a corporation; (internal quotation marks omitted) *id.*, at 617, 775 A.2d 928; and because the broad remedial purpose of the act is to "achieve clean water [despite] possible individual hardship"; (internal quotation marks omitted) *id.*, at 622, 775 A.2d 928; a corporate officer could be held personally liable for the abatement of a violation of the act when: "(1) the officer is in a position of responsibility that allows that officer to influence corporate policies and activities; (2) there is a nexus between the officer's actions or inactions in that position and the violation of § 22a-432 such that the corporate officer influenced the corporate actions that constituted the violation; and(3) the corporate officer's actions or inactions resulted in the violation." *Id.*, at 618, 775 A.2d 928. We emphasized, however, that we were "by no means establishing the responsibility of corporate officers in general with respect to corporate activity; we restrict the application of the responsible corporate officer doctrine solely to violations of the act." *Id.*

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[33] General Statutes § 34-134 provides: "A member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement."

In the present case, the airport defendants argue that, because § 22a-38(2)[34] does not define "person" to include corporate officers, and because we limited the application of the responsible corporate officer doctrine to § 22a-432 in *BEC Corp.*, Mellon cannot be held personally liable. We are not persuaded. Section 22a-432 is a strict liability statute; see *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection*, 253 Conn. 661, 670, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S.Ct. 1089, 148 L.Ed.2d 963 (2001); and the responsible corporate officer doctrine that we adopted in *BEC Corp.* was based on a case imposing liability on corporate officers for strict liability public welfare offenses. See *BEC Corp. v. Dept. of Environmental Protection*, supra, 256 Conn. at 618, 775 A.2d 928, citing *Matter of Dougherty*, 482 N.W.2d 485, 490 (Minn. App. 1992). Moreover, the responsible corporate officer doctrine that we adopted in *BEC Corp.* did not require a finding that the officer had committed, directly participated in or directed the conduct that resulted in a violation before he could be held personally liable, but required only that the officer have a position of responsibility and influence from which he could have prevented the corporation from engaging in the conduct. We conclude, therefore, that the responsible corporate officer doctrine that we adopted in *BEC Corp.*, and any limitations on that doctrine, apply solely to a corporate officer's personal liability for strict liability public welfare offenses committed by the corporation. We did not intend to overrule or abrogate the black letter principle that a corporate officer may be held personally liable for tortious conduct in which the officer directly participated, regardless of whether the statutory basis for

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[34] General Statutes § 22a-38 (2) defines " '[p]erson' " as "any person, firm, partnership, association, corporation, limited liability company, company, organization or legal entity of any kind, including municipal corporations, governmental agencies or subdivisions thereof . . . ."

the claim expressly allows liability to be imposed on corporate officers.[35]

We next address the airport defendants' claim with respect to § 34-134. That statute provides in relevant part: "A member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company . . . ." General Statutes § 34-134. The airport defendants argue that this statute, which was enacted in 1993; see Public Acts 1993, No. 93-267, § 20; supersedes the principle that officers of corporations may be held personally liable for their conduct on behalf of a company in certain circumstances as that principle applies to limited liability companies. See *Scribner v. O'Brien, Inc.*, supra, 169 Conn. at 404, 363 A.2d 160. We disagree. "Although the legislature may eliminate a common law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed." (Internal quotation marks omitted.) *Matthiessen v. Vanech*, 266 Conn. 822, 838-39, 836 A.2d 394 (2003). Section 34-134 evinces no legislative intent to eliminate the right to impose liability on a member or manager of a limited liability company who has engaged in or participated in the commission of tortious conduct. Rather, the statute merely codifies the well established principle that "an officer of a corporation does not incur personal liability for its torts *merely because of his official position.*" (Emphasis added.) *Scribner v. O'Brien, Inc.*, supra, at 404, 363 A.2d 160. Accordingly, we reject the airport defendants' arguments that the principle that corporate officers are personally responsible for their own tortious conduct does not apply in this case.

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[35] The airport defendants make no claim that a violation of § 22a-16 or § 22a-42a does not constitute tortious conduct.

V

We next address the claim of the plaintiffs on cross appeal that the trial court improperly failed to exercise its jurisdiction to order the airport defendants to restore the land trust defendants' properties to their condition prior to the violation of § 22a-44 (a) or to impose a civil penalty sufficient to fund the restoration of the properties. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. Christopher Allan, a senior associate with Land Tech Consultants and an expert witness for the plaintiffs, testified that restoration of the properties would require planting new trees and shrubs and fencing each tree and shrub individually to protect them from deer. He estimated that the cost of the restoration would be $158,092. Sigrun Gadwa, the principal ecologist for REMA Ecological Services and an expert witness for the airport defendants, testified that Allan's plan could be implemented for a cost of at least 20 percent less.

The airport defendants began their clear-cutting operation on November 29, 2000. Thirty-five days later, on January 2, 2001, Ventres issued a cease and desist order prohibiting the airport defendants from engaging in any further regulated activity at the site.

General Statutes § 22a-44 (b) provides in relevant part that "[a]ny person who commits . . . any violation of any provision of sections 22a-36 to 22a-45, inclusive, including regulations . . . promulgated by municipalities or districts pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense. Each violation of said sections shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense. . . ." Pursuant to this statute, the trial court imposed a civil penalty of $500

per day for each of the thirty-five days between November 29, 2000, and January 2, 2001, for a total of $17,500. The court declined to order the airport defendants to perform any restorative work because "no party proposes a replication of the conditions which existed before the clear-cutting occurred,"[36] because "the land upon which such action would occur is owned by others" and because the court addressed the issue of restoration in connection with the land trust defendants' claims pursuant to § 22a-16. As we have indicated, the trial court ordered the airport defendants to make a financial contribution of $50,000 pursuant to § 22a-16a, which provides that "under any provision of [title 22a] which provides for a civil or criminal penalty for a violation of such provision, the court, in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded, may order the defendant . . . (3) to make a financial contribution to an academic or government-funded research project related to environmental protection or conservation of natural resources . . . ." The court stated that "[i]t is expected that the [department of environmental protection] will identify a recipient connected to the Chapman's Pond preserve, if possible."

The plaintiffs argue on appeal that trial court's decision to assess $17,500 in civil penalties and not to order the airport defendants to restore the properties was an abuse of discretion because "[t]here was simply no testimony from which the court could conclude that $17,500 was sufficient to restore" the land to the condition it was in before the clear-cutting, and because § 22a-44 (b) contemplates that

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[36] The plaintiffs' experts did not propose returning the land to the condition that it was in before the clear-cutting because, as the trial court found, "invasive species, such as ailanthus trees, had already established themselves at this site for many years, and it is highly desirable ecologically to eradicate such invaders and replace them with native species."

penalties "shall be used . . . (1) to restore the affected wetlands or watercourses to their condition prior to the violation, wherever possible . . . ." They further argue that, pursuant to General Statutes § 22a-20,[37] the $50,000 contribution ordered by the trial court pursuant to § 22a-16a (3) was supplemental to the civil penalty ordered pursuant to § 22a-44 (b), not in lieu of it, and, therefore, should not be considered in determining whether the penalty was sufficient. The airport defendants counter that the trial court reasonably found that the plaintiffs' proposed restoration plan was excessive because it did not contemplate restoring the land to its original condition, but to an improved condition. They further argue that the trial court intended the $50,000 contribution to be part of the penalty for violating § 22a-44.

"A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law . . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion." (Internal quotation marks omitted.) *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 592, 598, 790 A.2d 1178 (2002).

This court has not previously had occasion to consider the scope of the trial court's discretion in ordering a civil penalty pursuant to § 22a-44 (b). Generally, in the absence of any specific guidance from the legislature,[38] a civil

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[37] General Statutes § 22a-20 provides in relevant part: "Sections 22a-14 to 22a-20, inclusive, shall be supplementary to existing administrative and regulatory procedures provided by law and in any action maintained under said sections, the court may remand the parties to such procedures . . . ."

[38] The plaintiffs argue that the trial court's discretion to impose civil penalties is limited by subdivision (1) of § 22a-44 (b), which

penalty provision vests wide discretion in the court to determine a fair and proper penalty. See *Carothers v. Capozziello*, 215 Conn. 82, 103, 574 A.2d 1268 (1990).[39]

As the airport defendants point out, the trial court determined that the restoration plan proposed by the plaintiffs' expert would not have restored the land to its prior condition, but would have improved the condition of the land. The plaintiffs have not disputed that finding. We conclude that the court was not required to create and

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provides that civil penalties imposed pursuant to that statute "shall be used solely . . . to restore the affected wetlands or watercourses to their condition prior to the violation, wherever possible . . . ." We disagree. That language merely provides that any penalties that are assessed should be used to restore the wetlands. It does not require the court to impose a penalty that is sufficient to restore the wetlands.

[39] We previously have held that, in assessing penalties under other civil penalty provisions of title 22a that provide no specific guidance to the court, the factors to be considered by the court "include, but are not limited to: (1) the size of the business involved; (2) the effect of the penalty or injunctive relief on its ability to continue operation; (3) the gravity of the violation; (4) the good faith efforts made by the business to comply with applicable statutory requirements; (5) any economic benefit gained by the violations; (6) deterrence of future violations; and (7) the fair and equitable treatment of the regulated community." *Carothers v. Capozziello*, supra, 215 Conn. at 103-104, 574 A.2d 1268 (listing factors to be considered in imposing civil penalty pursuant to General Statutes § 22a-226 pertaining to penalty for violation of solid waste management statutes); see also *Rocque v. Farricielli*, 269 Conn. 187, 210, 848 A.2d 1206 (2004) (factors listed in *Carothers* are to be considered in imposing civil penalties pursuant to General Statutes §§ 22a-226a [governing penalties for violation of selected solid waste management statutes] and 22a-438 [a] [governing penalties for violation of water pollution control statutes]). None of the parties argue that these factors should apply in the present case, however, and the trial court did not identify the factors that entered into its calculations.

impose on the airport defendants a plan of its own to restore the land to its condition prior to the violation. Nor was it required to issue a general order to the airport defendants that they restore the land to its prior condition, which almost certainly would have led to additional litigation. Accordingly, we conclude that the trial court did not abuse its discretion in declining to order the airport defendants to restore the land.

We also reject the plaintiffs' argument that the $50,000 contribution imposed pursuant to § 22a-16a (3) was supplemental to the $17,500 penalty imposed pursuant to § 2a-44 (b), not in lieu of it, and, therefore, should not be considered in determining whether the trial court abused its discretion. Section 22a-16a specifically provides that any financial contribution ordered pursuant to that statute is "in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded" under any other provision of title 22a that provides for a civil penalty. (Emphasis added.) Accordingly, we reasonably may conclude that, if the court had not ordered the financial contribution pursuant to § 22a-16a, the civil penalty pursuant to § 22a-44 (b) would have been greater. In addition, the court expressed its expectation that the entire $67,500 would be used to improve the condition of the land trust defendants' properties. The plaintiffs make no claim that the imposition of a civil penalty of $67,500 would have been an abuse of discretion. As we have indicated, the trial court reasonably could have concluded that the plaintiffs' expert's estimated cost of restoration was excessive because the plan would not have restored the land to its previous condition, but would have improved the condition. Accordingly, we conclude that the trial court did not abuse its discretion in imposing a civil penalty of $17,500 pursuant to § 22a-44 (b).

VI

We next address the plaintiffs' claim on cross appeal that the trial court improperly suspended the calculation of per diem civil penalties upon the commission's issuance of the cease and desist order. We disagree.

The following additional facts are relevant to our resolution of this issue. As we have indicated, on January 2, 2001. Ventres issued an order to the airport defendants ordering them to cease and desist from all regulated activity on the airport property and on the land trust defendants' properties. The order identified the prohibited regulated activity as "clear-cutting of a flood plain forest . . . and disturbance of the flood plain soils around the tidal inlet at the end of the property . . . ." The order stated that "[s]atisfactory corrective measures are not to be done without a permit from the [c]ommission" and required the airport defendants to appear at a hearing on January 11, 2001, to show cause why the order should not remain in effect. Because several commission members had recused themselves from the matter, however-apparently because the airport defendants had alleged a conflict of interest-no quorum was available on the date of the hearing. At a June 11, 2001 commission meeting on a related matter, counsel for the airport defendants withdrew the conflict of interest claim as to two of the three commission members who had recused themselves.[40] The cease and desist hearing was never rescheduled, however, and the plaintiffs never issued any order to the airport defendants to correct the condition of the land trust defendants' land. See General Statutes § 2a-

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[40] The airport defendants represent in their brief that the June 11, 2001 meeting concerned an application submitted by the airport to extend its runway. They argue that they did not intend to withdraw their motion to disqualify the commission members in proceedings on the pending cease and desist order. We need not decide whether the commission members were recused after June 11, 2001, however, because the issue is irrelevant to our analysis.

44 (a) (inland wetlands agency is authorized to issue order to correct condition created by violation of the act).

As we have indicated, the trial court imposed a $500 per diem fine on the airport defendants for the thirty-five days between the day that they began cutting the trees on the land trust defendants' properties, November 29, 2000, and the day that the cease and desist order was issued, January 2, 2001. The court reasoned that, because the order was never lifted, it prevented "the airport defendants from implementing any corrective or remedial plan because such action would necessarily involve the removal and deposition of material at the site and would alter wetlands, albeit for environmentally beneficial purpose." The plaintiffs argue that the trial court improperly limited the per diem penalties to the thirty-five day period because the cease and desist order did not prevent the airport defendants from submitting a restoration plan to the commission. They further argue that, because they requested restoration of the land in their complaint, which listed a return date of May 8, 2001, and because the airport defendants made no effort to submit a restoration plan up to the date of the court's decision, May 21, 2004, the trial court should have imposed civil penalties for that entire period.

We conclude that the plaintiffs' argument is flawed in several respects. First, § 22a-44 (b) authorizes the imposition of civil penalties for violations of the act. In the present case, the violation consisted of clear-cutting the properties. The plaintiffs have provided no authority for the proposition that the statute authorizes the imposition of civil penalties for the failure to remediate such violations in the absence of any administrative or court order to do so. Moreover, whether the airport defendants were required to restore the properties and, if so, the nature and scope of any such work, were the very issues in dispute in the litigation initiated by the plaintiffs. The plaintiffs have provided no authority for the proposition that, during the pendency of the action, the

airport had a duty under the act to submit a restoration plan. We conclude, therefore, that it was not an abuse of discretion for the trial court to limit the per diem penalties to the period during which the violation occurred and to decline to impose per diem penalties for the period during which the action was pending.

VII

We next address the land trust defendants' claim on cross appeal that the trial court improperly struck their cross claim under CUTPA. We disagree.

The following procedural history is relevant to our resolution of this issue. The land trust defendants alleged in the fifth count of their cross claim that: (1) the airport defendants had violated CUTPA by threatening expensive and protracted litigation "in an attempt to stifle the [land trust] and its individual volunteer members' participation in government process"; (2) Mellon had a history of using bad faith litigation to further his business interests and had initiated litigation against the members of the land trust board in an effort to "squelch opposition"; and (3) the trees were clear-cut to facilitate the expansion of the airport's runway, which otherwise would not have been permitted, and directly injured the land trust defendants' business interests of protecting and preserving property for public enjoyment. The airport defendants filed a motion to strike the CUTPA claim on the grounds that they were merely defending themselves against the action filed by the plaintiffs and that their defense against the action was not their "trade or business." They also argued that the airport defendants had not alleged any facts that would support a claim under CUTPA. The trial court granted the motion to strike on the ground that the land trust defendants were not competitors or customers of the airport defendants.

The land trust defendants now claim that the trial court improperly determined that CUTPA imposes a requirement

that the plaintiff be either the defendant's competitor or its customer. They argue that CUTPA protects businesspersons in general, not just consumers and competitors, and that the airport defendants' conduct interfered with their business of protecting natural resources. The airport defendants counter, essentially as an alternate ground for affirmance, that the land trust defendants' claims that the airport defendants were using litigation to intimidate and stifle the participation of the land trust and its volunteers in government process and that Mellon had a history of initiating baseless litigation to further his business interests are entirely without factual basis and, in any event, cannot support a CUTPA claim as a matter of law. The airport defendants do not address the claim that clear-cutting the land trust defendants' land to advance their own business interest in facilitating the expansion of the runway was a CUTPA violation.

"The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Citations omitted; internal quotation marks omitted.) *Jewish Home for the Elderly of Fairfield County, Inc. v. Cantore*, 257 Conn. 531, 537-38, 778 A.2d 93 (2001).

"[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the

criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (Internal quotation marks omitted.) *Hartford Electric Supply Co. v. Allen-Bradley Co.*, 250 Conn. 334, 367-68, 736 A.2d 824 (1999).

"[W]e previously have stated in no uncertain terms that CUTPA imposes no requirement of a consumer relationship. In *McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 Conn. 558, [566-67], 473 A.2d 1185 (1984), we concluded that CUTPA is not limited to conduct involving consumer injury and that a competitor or other business person can maintain a CUTPA cause of action without showing consumer injury." (Internal quotation marks omitted.) *Macomber v. Travelers Property & Casualty Corp.*, 261 Conn. 620, 643, 804 A.2d 180 (2002).

With respect to the land trust defendants' allegations that the airport defendants had threatened and actually engaged in oppressive litigation tactics, we conclude that the trial court properly determined that the allegations did not support a CUTPA claim. We note that the allegations are vague in that they do not indicate whether the land trust defendants are claiming that the airport defendants' litigation conduct in the present case was improper or that they had initiated a separate action against the members of

the land trust board. To the extent that the land trust defendants claim that the conduct of the airport defendants in defending themselves from the claims against them in the present action was improper, they have not cited any authority for the proposition that a defendant's vigorous defense against a lawsuit may form the basis for a CUTPA claim in that very lawsuit. Although the land trust defendants make a passing reference in their brief to this court to an action filed by the airport defendants in federal court, they do not discuss the nature or status of that action. We recently have held that claims based on the improper litigation conduct of the defendant in another pending action were properly stricken as duplicative and premature.[41] See *Larobina v. McDonald*, 274 Conn. 394, 407-408, 876 A.2d 522 (2005). Likewise, the allegations in the present case would require the trial court to determine the validity of the airport defendants' claims in a separate action that apparently is still pending, thereby giving rise to duplicative litigation and potentially inconsistent verdicts. Accordingly, we conclude that the trial court properly struck these allegations.

With respect to the land trust defendants' claim that the trial court improperly struck their allegation that the airport defendants' violated CUTPA by clear-cutting their land to advance their business interest in expanding the runway,

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[41] The Appellate Court has suggested in dicta that "a party's use of its economic powers in an attempt to stifle individual citizens' use of valid governmental processes by threat of expensive litigation potentially constitutes a violation of CUTPA, which is expressly modeled on § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." *Zeller v. Consolini*, 59 Conn. App. 545, 562 n. 7, 758 A.2d 376 (2000). In Zeller, the defendants initiated the sham litigation, in which the plaintiff ultimately prevailed. *Id.*, at 547-48, 758 A.2d 376. The court, in *Zeller*, did not indicate that conduct in defending a lawsuit or conduct in a separate pending action could form the basis of a CUTPA claim.

the land trust defendants argue that this court expressly has held that CUTPA does not require the existence of a consumer relationship and implicitly has held that a competitor relationship is not necessary. See *Macomber v. Travelers Property & Casualty Corp.*, supra, 261 Conn. at 643, 804 A.2d 180 (upholding CUTPA claim where plaintiffs were neither consumers nor competitors of defendant). The land trust defendants argue that the cigarette rule "encompasses businesspersons in general," that they are in the business of protecting natural resources, and that they are "competing [with the airport defendants] for the airspace that the trees had occupied." We are not persuaded. Even if we assumed that the land trust defendants are in the business of protecting natural resources, we cannot conclude that the interference with that business by a trespasser constitutes an unfair trade practice. Such a conclusion would convert every trespass claim involving business property into a CUTPA claim. We also reject the land trust defendants' claim that they are "competing" with the airport defendants for the rights to the airspace over their properties. The relationship between the land trust defendants and the airport defendants cannot be characterized as competitive in any ordinary business sense. Rather, before the clear-cutting, the relationship was merely one of neighboring landowners. After the clear-cutting, the relationship was one of landowner and trespasser. Accordingly, we reject the land trust defendants' argument that they had a business relationship with the airport defendants.

The land trust defendants argue, alternatively, that a CUTPA plaintiff is not required to allege any business relationship with the defendant. They have provided no authority, however, for that proposition. Cf. *Macomber v. Travelers Property & Casualty Corp.*, supra, 261 Conn. at 626, 804 A.2d 180 (plaintiffs were not consumers or competitors of defendant, but had entered into settlement agreements

with defendant). Accordingly, we reject this argument. We conclude that the trial court properly determined that the land trust defendants' allegation that the airport defendants violated CUTPA by clear-cutting their land to advance their business interest in expanding the runway is insufficient to support a CUTPA claim, and, therefore, that the court properly granted the motion to strike the CUTPA claim.

VIII

Finally, we address the claim of the land trust defendants on cross appeal that the trial court improperly determined that they were precluded from introducing evidence concerning the replacement value of the trees in support of their claim for damages pursuant to § 52-560. We disagree.

The following additional procedural history is relevant to our resolution of this claim. The land trust defendants claimed in the second count of their cross claim that the airport defendants had intentionally trespassed on their property and had intentionally destroyed their trees, entitling them to treble damages under § 52-560. At trial, the land trust defendants did not introduce any evidence as to the value of the trees as cut wood or as to the diminution of the value of their land as a result of the clear-cutting. Instead, they asked the trial court to award treble damages under § 52-560 based on the replacement value of the trees and submitted a report by Bruce Spaman, an arboriculture and forestry consultant with Forest Management Services, estimating that the cost of replacement would be between $203,400 and $220,350.

The trial court concluded that the claim was precluded by the Appellate Court's decision in *Stanley v. Lincoln*, 75 Conn. App. 781, 818 A.2d 783 (2003). In that case, the Appellate Court stated that "[t]here are three possible measure of damages for loss of a tree in Connecticut." (Internal quotation marks omitted.) *Id.*, at 785, 818 A.2d 783.

In an action for trespass that alleges the loss of trees, "[i]t is an appropriate remedy either for the recovery of damages for the mere unlawful entry upon the plaintiff's land; for the recovery of the value of the trees removed, considered separately from the land; or for the recovery of damages to the land resulting from the special value of the trees as shade or ornamental trees while standing on the land. For a mere unlawful entry upon land nominal damages only would be awarded. If the purpose of the action is only to recover the value of the trees as chattels, after severance from the soil, the rule of damages is the market value of the trees for timber or fuel. For the injury resulting to the land from the destruction of trees which, as a part of the land, have a peculiar value as shade or ornamental trees, a different rule of damages obtains, namely, the reduction in the pecuniary value of the land occasioned by the act complained of. . . .

"This common-law rule has been embodied in § 52-560 . . . . That statute does not give a new and independent cause of action, but prescribes the measure of damages in cases where compensatory damages would, in the absence of the statute, be recoverable." (Citations omitted; internal quotation marks omitted.) *Id.*, at 785-86, 818 A.2d 783.

"[R]eplacement value is not a proper measure of damages in tree cutting cases because [s]uch a measure of damages . . . would lead to unreasonable recoveries in excess of the market value of the land . . . would raise impossible issues in resolving the replacement values of healthy or partially damaged trees . . . [and] cannot be practically applied." (Internal quotation marks omitted.) *Id.*, at 789 n.7, 818 A.2d 783, quoting *Maldonado v. Connecticut Light & Power Co.*, 31 Conn. Supp. 536, 539, 328 A.2d 120 (1974). Although the court in Maldonado concluded that the cost of replacing the trees was not a proper measure of damages, it stated that "[i]t is . . . well established that [the diminution in property value as a result of cutting the trees]

may be determined by the cost of repairing the damage, provided, of course, that that cost does not exceed the former value of the property and provided also that the repairs do not enhance the value of the property over what it was before it was damaged." (Internal quotation marks omitted.) *Maldonado v. Connecticut Light & Power Co.*, supra, at 539, 328 A.2d 120.

In order to resolve this claim, it is necessary to clarify the Appellate Court's ruling in *Stanley*. The Appellate Court suggested in that case that the common-law rule that the diminution in property value is a proper measure of damages in tree cutting cases had been embodied in § 52-560. *Stanley v. Lincoln*, supra, 75 Conn. App. at 786, 818 A.2d 783. The court also suggested that, under the common law, the replacement value of the trees was not a proper measure of damages and, therefore, was not a proper measure of damages under § 52-560. See *id.*, at 788-89, 818 A.2d 783. We do not entirely agree with this analysis. Rather, we conclude that, although damages for the reduction in pecuniary value of the land-determined by the replacement cost of the trees, if appropriate-were available under the common law,[42] the plain language of § 52-560 authorizes treble damages only for the value of the trees as commodities, not for the reduction in the pecuniary value or for the replacement cost of the trees. "We are not permitted to supply statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *Connecticut Light & Power Co. v. Dept. of Public Utility Control*, 266 Conn. 108, 119, 830 A.2d 1121 (2003). Accordingly, we conclude that the trial court properly determined that

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[42] The land trust defendants made no such claim under the common law. Accordingly, there is no need to decide in this case whether the enactment of § 52-560 preempted a common-law cause of action.

replacement cost was not a proper measure of damages under § 52-560.

The land trust defendants argue, however, that this court should "recognize an exception to the limitation on damages set forth in [*Stanley*]" and permit damages to be calculated on the basis of the replacement cost of the trees when "the value of the property lies in its place within the environment, rather than as a potential building lot or a working woodlot." As we have indicated, however, the plain language of the statute precludes such a reading. "[This] court is precluded from substituting its own ideas of what might be a wise provision in place of a clear expression of legislative will." (Internal quotation marks omitted.) *Skindzier v. Commissioner of Social Services*, 258 Conn. 642, 661, 784 A.2d 323 (2001). Accordingly, we decline to read into § 52-560 the exception urged by the land trust defendants.

The judgment is affirmed.

In this opinion the other justices concurred.

APPENDIX B

SUPREME COURT OF CONNECTICUT

Arthur J. ROCQUE,
Commissioner of Environmental Protection,
v.
Timothy MELLON et al.

No. 17281.

Argued April 14, 2005.
Decided Aug. 30, 2005.

John R. Bashaw, New Haven, for the appellants-appellees (named defendant et al.).

Janet P. Brooks and David H. Wrinn, assistant attorneys general, with whom, on the brief, was Richard Blumenthal, attorney general, for the appellee-appellant (plaintiff).

SULLIVAN, C.J., and BORDEN, NORCOTT, PALMER and ZARELLA, Js.

SULLIVAN, C.J.

This appeal arises out of a complaint filed by the plaintiff, Arthur J. Rocque, the commissioner of environmental protection (commissioner), against the defendants, Timothy Mellon, Goodspeed Airport, LLC (airport), the East Haddam Land Trust (land trust) and the Nature Conservancy (conservancy). The commissioner alleged that Mellon and the airport (collectively, airport defendants) violated General Statutes § 22a-16[1] of the

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[1] General Statutes § 22a-16 provides: "The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal

Connecticut Environmental Protection Act (act) by cutting down trees and other vegetation on two properties owned, respectively, by the land trust and the conservancy (collectively, land trust defendants). After a trial to the court,[2] the court rendered judgment for the airport defendants on count one of the complaint alleging unreasonable impairment of wetlands and watercourses in violation of § 22a-16, and for the commissioner on count three of the complaint alleging unreasonable impairment and destruction of floodplain forest in violation of § 22a-16.[3]

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entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state."

[2] The case was tried jointly with an action brought by the inland wetlands and watercourses commission of the town of East Haddam and its enforcement officer, James Ventres, against Mellon, the Goodspeed Airport, LLC, and Timothy Evans. The trial court's ruling in that case is the subject of the airport defendants' appeal in the companion case of *Ventres v. Mellon*, 275 Conn. 105, 881 A.2d 937 (2005).

[3] The commissioner withdrew count two of the complaint, which alleged a violation of General Statutes § 22a-42a(c)(1).

The airport defendants appealed[4] and the commissioner cross appealed. We conclude that the trial court improperly rendered judgment for the airport defendants on count one of the commissioner's complaint. We affirm the judgment of the trial court in all other respects.

The record reveals the following relevant facts and procedural history. The airport is located on Lumberyard Road in East Haddam. It is an "[a]irport available for public use" within the meaning of title 14 of the Code of Federal Regulations, § 77.2.[5] Mellon is the sole member of Goodspeed Airport, LLC. The airport's southern boundary lies approximately along the centerline of a tidal creek that flows in a westerly direction into the Connecticut River. That boundary forms the northern boundary of property owned by the land trust, which extends for approximately 335 feet to the south, where it abuts property owned by the conservancy. The conservancy's property extends for another 100 feet to the south, at which point it abuts Chapman Pond. The airport has a 2100 foot runway that runs in a north-south direction. The southern end of the runway is approximately 630 feet north of the airport's southern boundary and 1100 feet north of Chapman Pond.

Between November 29, 2000, and December 5, 2000, Timothy Evans, an independent contractor and the manager of the airport since November, 2003, cut down all of the trees, bushes and woody vegetation on approximately 2.5 acres of land located between the southern boundary of the airport property and Chapman Pond. Evans cut the

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[4] The airport defendants appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

[5] Title 14 of the Code of Federal Regulations, § 77.2 defines an "[a]irport available for public use" as "an airport that is open to the general public with or without a prior request to use the airport."

vegetation at the direction of Mellon and without the permission of the land trust defendants. Approximately 340 trees were destroyed, including some that were 100 years old and seventy-two feet high. The airport defendants claim that the trees and vegetation posed a danger to aircraft landing at and taking off from the runway. The 2.5 acres were entirely within a regulated wetlands area as defined by General Statutes § 22a-38(15)[6] and were part of a wildlife refuge and nature preserve that extends along the Connecticut River.

Thereafter, the commissioner brought this action alleging that the airport defendants violated the act by cutting the trees and vegetation. In count one of the complaint, the commissioner alleged that "[b]y clear cutting trees on the properties of the [land trust defendants] . . . without a permit issued under the Inland Wetlands and Watercourses Act, [General Statutes § 22a-28 et seq.] the [airport defendants] unreasonably impaired wetlands and watercourses, natural resources of the State of Connecticut, and the public trust therein." In count three of the complaint, the commissioner alleged that "[b]y clear cutting trees on the properties of the [land trust defendants] . . . the [airport defendants] unreasonably impair[ed] or destroyed approximately four acres of floodplain forest, a natural resource of the State of Connecticut, and the public trust therein." The airport defendants raised numerous special defenses to the commissioner's complaint, including a claim that the plaintiff's action was preempted by federal aviation

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[6] General Statutes § 22a-38(15) defines " '[w]etlands' " as "land, including submerged land, not regulated pursuant to sections 22a-28 to 22a-35, inclusive, which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and floodplain by the National Cooperative Soils Survey, as may be amended from time to time, of the Natural Resources Conservation Service of the United States Department of Agriculture . . . ."

law. After a trial to the court, the court rendered judgment for the airport defendants on count one of the complaint on the ground that the failure to obtain a necessary environmental permit cannot form the basis for a claim under the act. The court rejected the airport defendants' preemption claim and rendered judgment for the commissioner on the third count of the complaint. This appeal and cross appeal followed.

On appeal, the airport defendants claim that the trial court: (1) improperly determined that the act is not preempted by federal aviation law; (2) should have rendered judgment for them on count three of the complaint for the same reasons that it rendered judgment for them on count one; (3) improperly determined that the removal of vegetation from the properties was a regulated activity under the inland wetlands and watercourses act; and (4) improperly determined that Mellon was personally liable for cutting the trees. The commissioner claims on cross appeal that the trial court improperly rendered judgment for the airport defendants on count one of its complaint because the claim was primarily directed to the polluting activity itself and not to the failure to obtain a permit. In the companion case of *Ventres v. Mellon*, 275 Conn. 105, 881 A.2d 937 (2005), we rejected claims identical to the airport defendants' first, third and fourth claims in the present case. We adopt the reasoning and conclusions of that case herein. We agree with the commissioner's claim on cross appeal that the trial court improperly rendered judgment for the airport defendants on count one of its complaint and, for the same reasons, we reject the airport defendants' second claim on appeal.

Because our resolution of the commissioner's claim on cross appeal guides our resolution of the airport defendants' sole remaining claim on appeal, we first address that issue. The commissioner alleged in count one of its complaint that "[b]y clear cutting trees on the properties of the [land trust

defendants] . . . without a permit issued under the Inland Wetlands and Watercourses Act, the [airport defendants] unreasonably impaired wetlands and watercourses, natural resources of the State of Connecticut, and the public trust therein." The trial court, citing this court's decision in *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 138-48, 836 A.2d 414 (2003), concluded that "the failure to obtain a license or permit to engage in conduct which impinges on the environment cannot form the basis for a . . . claim under § 22a-16." In support of its claim on cross appeal, the commissioner argues that count one of the complaint is not foreclosed by *Connecticut Coalition Against Millstone* because he did not allege that the airport defendants' failure to obtain a permit violated § 22a-16, but that the clear-cutting itself constituted unreasonable pollution.

The commissioner's claim implicates its standing to raise a claim under § 22a-16 and, therefore, implicates the trial court's subject matter jurisdiction over the claim. See *id.*, at 127-28, 836 A.2d 414. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Id.*

In *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. 116-18, 134, 836 A.2d 414, the plaintiffs, environmental activists, claimed that the Millstone Nuclear Power Generating Station should be enjoined from operating because it was functioning under an improperly issued permit. We determined that "[a]llegations of improper decisions by the commissioner for failure to comply with the statutory requirements regarding permit renewal proceedings and emergency authorizations cannot be construed as anything other than a licensing claim under

[General Statutes] § 22a-430." *Id.*, at 134, 836 A.2d 414. Relying on a long series of cases in which we had held that § 2a-16 does not confer standing to litigate permitting decisions that are within the exclusive jurisdiction of a state agency, we concluded that the trial court properly had dismissed the plaintiffs' claims. *Id.*, at 129-38, 836 A.2d 414. In doing so, we distinguished other cases in which we had determined that the plaintiffs had standing under § 22a-16 because, although the lack of an appropriate permit had been alleged, the plaintiffs had raised independent "claims of unreasonable pollution [that] were directed primarily to the polluting activity itself, and not . . . to the validity of an existing permit or authorization . . . ." *Id.*, at 139-40, 836 A.2d 414, citing *Keeney v. Old Saybrook*, 237 Conn. 135, 140-41, 676 A.2d 795 (1996) (alleging unreasonable pollution of state waters from town's failure to comply with pollution abatement orders); *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co.*, 227 Conn. 175, 190, 629 A.2d 1116 (1993) (alleging unreasonable pollution from failure to obtain permit for operation of solid waste facility that generated leachate, which degraded groundwater); *Keeney v. L & S Construction*, 226 Conn. 205, 209, 626 A.2d 1299 (1993) (alleging unreasonable pollution from depositing construction debris in close proximity to area water supply without permit).

We conclude that count one of the commissioner's complaint in the present case falls into the category of the cases that we distinguished in *Connecticut Coalition Against Millstone*. The commissioner did not claim that the airport defendants' failure to obtain a wetlands permit constituted a violation of § 22a-16; he claimed that clear-cutting the trees constituted unreasonable pollution. Accordingly, we conclude that the commissioner had standing to make this claim and, therefore, that the trial court improperly rendered judgment for the airport defendants.

Because the trial court concluded that the claim was barred by *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. 116, 836 A.2d 414, it did not reach the issue of whether the conduct alleged in count one of the complaint constituted unreasonable pollution under § 22a-16. We address the question in the interest of judicial efficiency and to avoid the potential for inconsistent verdicts. In *Waterbury v. Washington*, 260 Conn. 506, 557, 800 A.2d 1102 (2002), we held that "when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under [§ 22a-16], whether the conduct is unreasonable under [§ 22a-16] will depend on whether it complies with that scheme." We concluded in *Ventres v. Mellon*, supra, 275 Conn. at 132, 881 A.2d 937 that in the absence of any property right that would have entitled the airport defendants to apply for a wetlands permit to clear-cut the properties, their activities necessarily would not have been permitted. Therefore, we concluded that the trial court properly determined that the conduct alleged by the land trust defendants was unreasonable. See *id.*, at 135-37 and n. 29, 881 A.2d 937 (concluding that trial court properly rendered judgment for land trust defendants on cross claim pursuant to § 22a-16). It necessarily follows that the conduct alleged in count one of the commissioner's complaint constituted an unreasonable destruction of the wetlands. Accordingly, we conclude that the trial court should have rendered judgment for the commissioner on this claim.[7]

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[7] On remand, the trial court will be required to determine whether count one of the commissioner's complaint was duplicative of count three for purposes of issuing orders pursuant to General Statutes § 22a-16a or whether the commissioner is entitled to additional orders under count one.

General Statutes § 22a-16a provides in relevant part: "In any action brought by the Attorney General under section 22a-16 or

For the same reasons, we reject the airport defendants' claim on appeal that the trial court improperly rendered judgment for the commissioner on the third count of its complaint. The commissioner made no claim that the airport defendants' failure to obtain a permit to destroy the floodplain forest violated § 22a-16. Indeed, count three makes no reference to any need for a permit. Instead, the claim was "directed primarily to the polluting activity itself . . . ." *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. at 139, 836 A.2d 414. Accordingly, we conclude that the trial court properly rejected the airport defendants' claim that the land trust defendants lacked standing to make this claim and properly rendered judgment in favor of the commissioner.

On the plaintiff's cross appeal, the judgment is reversed in part and the case is remanded to the trial court with direction to render judgment for the plaintiff on count one of the complaint and for further proceedings to determine whether additional orders should be issued pursuant to

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under any provision of this title which provides for a civil or criminal penalty for a violation of such provision, the court, in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded, may order the defendant (1) to provide for the restoration of any natural resource or the investigation, remediation or mitigation of any environmental pollution on or at any real property which resource or property are unrelated to such action, (2) to provide for any other project approved by the Commissioner of Environmental Protection for the enhancement of environmental protection or conservation of natural resources, (3) to make a financial contribution to an academic or government-funded research project related to environmental protection or conservation of natural resources, or (4) to make a financial contribution to the Special Contaminated Property Remediation and Insurance Fund established under section 22a-133t provided the total aggregate amount of all contributions to said fund under this section shall not exceed one million dollars per fiscal year . . . ."

General Statutes § 22a-16a under that count. The judgment is affirmed in all other respects.

In this opinion the other justices concurred.

APPENDIX C

UNPUBLISHED OPINION.
CHECK COURT RULES BEFORE CITING.

SUPERIOR COURT OF CONNECTICUT,
JUDICIAL DISTRICT OF TOLLAND

James VENTRES, et al.
v.
GOODSPEED AIRPORT, et al.
Nos. X07CV0100076812S, X07CV0200805405.

May 21, 2004.

Branse & Willis LLC, Glastonbury and Howd & Ludorf, Hartford, for James Ventres and East Haddam IWWC.

Brenner Saltzman & Wallman, New Haven, for Goodspeed Airport LLC, Timothy Mellon, Timothy Evans, East Haddam Land Trust and Nature Conservancy of Connecticut Inc.

Murtha Cullina LLP, Hartford, for The Nature Conservancy and East Haddam Land Trust.

Webber & Eisenstein LLC, Simsbury, for Arthur M. D'Onofrio.

AAG Janet Brooks, Hartford, for Connecticut Dept. of Environmental Protection.

SFERRAZZA, J.

On eight days between February 24 and March 9, 2004, the court presided over a joint trial to the court involving a case filed by plaintiffs, James Ventres, as enforcement officer for the East Haddam Inland Wetlands and Watercourses Commission ("the Commission"), and the Commission, against defendants, the Goodspeed Airport, LLC, Timothy Mellon, Timothy Evans, (collectively "the airport

defendants"), the East Haddam Land Trust ("the Land Trust"), and the Nature Conservancy, which case has docket number X07-CV01-0076812. The second case was one filed by plaintiff Arthur J. Rocque, Jr., as Commissioner of the state Department of Environmental Protection (DEP), against the same defendants, except for Evans, which case is docketed as X07-CV02-0080540. In this memorandum the court will also decide the issues raised by the cross claims of the defendants filed in the wetlands commission case. Trial of the counterclaims of Mellon, Evans, and Goodspeed Airport, LLC, has been bifurcated for adjudication at a later date.

The disputes in these matters stem from the following incident. Between November 29 and December 5, 2000, at the direction of Mellon, the owner of the airport, Evans, an independent contractor, clear-cut approximately 2.5 acres of floodplain forest located on land owned by the Land Trust and land owned by the Conservancy. Evans severed all trees, bushes, and woody stemmed vegetation growing on this acreage. The remaining stumps ranged from ground level to a few feet in height. Around 340 trees were felled, as well as innumerable shrubs. Some of the trees cut by Evans were as old as 100 years and had grown seventy-two feet high.

The clear-cut land lies directly south of a tidal brook, which brook forms the boundary between airport land to the north and the Land Trust property to the south. The Conservancy owns land south of the Land Trust parcel, and to the south of that property is Chapman's Pond. A 2000-foot runway on the airport property runs generally from north to south and ends about 630 feet north of the tidal brook. The clear-cut area would be bisected by the center line of the runway if that center line were extended in a southerly direction. The Land Trust property is about 335 feet wide from the tidal brook to the Conservancy land. The

Conservancy property extends about 100 feet southerly until it reaches the high tide edge of Chapman's Pond.

The airport defendants never sought a permit or other approval from the Commission to lear-cut the area, which is roughly 300 feet wide and 325 feet long, nor did these defendants obtain permission from the Land Trust or the Conservancy to enter their property and cut vegetation. Additional facts will be recited where pertinent.

In X07-CV01-0076812, Ventres, on behalf of the Commission, sues the airport defendants, for clear-cutting in regulated wetlands without a permit or Commission approval to do so. Pursuant to General Statutes § 22a-44(b), the Commission seeks the imposition of civil penalties, an award of attorneys fees, expenses and costs, and injunctive relief. The Land Trust and Nature Conservancy, by way of cross claims, sue these defendants for indemnification, trespass, conversion, and the unreasonable impairment or destruction of natural resources under the Connecticut Environmental Protection Act (CEPA), and seek such compensatory damages, attorneys fees and costs, punitive damages, and injunctive relief as is provided by law, in particular General Statutes § 52-560 and CEPA. The airport and Mellon cross claim against the Land Trust and Nature Conservancy for trespass, negligence, negligent and absolute nuisance, conversion, and indemnification.

In X07-CV02-0080540, the DEP sues the airport and Mellon in two counts under CEPA, alleging a violation of statutory law governing wetlands and watercourses, and the unreasonable impairment or destruction of a forest, respectively. The DEP seeks declaratory and injunctive relief, attorneys fees, expenses, and costs, and monetary damages as provided for under CEPA.

I

THE EAST HADDAM INLAND WETLANDS AND WATERCOURSES COMMISSION CLAIMS IN

X07-CV01-0076812

General Statutes § 22a-44(b) states:

> Any person who commits, takes part in, or assists in any violation of any provision of Sections 22a-36 to 22a-45, inclusive, including regulations adopted by the commission and regulations promulgated by municipalities . . . pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense.

In 1974, pursuant to General Statutes §§ 22a-36 and 22a-42, the town of East Haddam designated the East Haddam Inland Wetlands and Watercourses Commission as the local agency charged with regulating inland wetlands for the town. On October 17, 1974, the commission adopted regulations which were last revised on June 1, 1995.

Section 5 of the local regulations proscribes the engaging in regulated activity in wetlands without first securing a permit from the Commission. The clear-cut area is entirely wetlands, as that term is defined by General Statutes § 22a-38(15) and § 2.1.r of the local wetlands regulations, because that land consists of poorly or very poorly drained soils and is part of the Connecticut River floodplains.

The Commission has proven, by a preponderance of the evidence, that the clear-cutting of the 2.5 acres of floodplain forest is a regulated activity within the meaning of the local regulations and state statutes. The clear-cutting which took place on this wetlands was a "regulated activity" because the local regulations define that phrase to embrace any activity within or use of a wetlands which involves the

alteration of the wetlands, with certain, specific exceptions inapplicable to the circumstances of the present case.

The floodplain forest which was clear-cut comprised diverse species of hardwood trees and woody shrubs. As noted above, around 340 trees and tree sprouts were severed on Land Trust property and a few more on Conservancy land. These trees acted as a flood brake, slowing the velocity of the occasional floodwaters of the Connecticut River which regularly spill into the floodplains and eventually into Chapman's Pond. The slower the flow of floodwater, the less erosion, scouring, and damage to the submerged land and water bodies is done. The taller and denser the floodplain forest, the greater the buffering capacity to slow floodwaters. Undoubtedly, the felling of all trees and woody vegetation over 2.5 acres in the midst of a floodplain corridor between the Connecticut River and Chapman's Pond altered that wetlands and the abutting floodplains and wetlands.

Under General Statutes § 22a-42a(c)(1) and § 5.1 of the local regulations, no regulated activity, including the clear-cutting of 2 .5 acres of floodplain forest as was done by and for the airport defendants, can proceed without obtaining a permit from the Commission. As recounted earlier, these defendants never sought nor secured such a permit. Therefore, unless the airport defendants can interpose a special defense which removes them from this permit requirement, they are liable under § 22a-44(b) for the remedies and penalties provided therein.

II

SPECIAL DEFENSES

A.

PREEMPTION

The first special defense asserted by the airport defendants is federal preemption. These defendants argue

that because the Federal Aviation Administration (FAA) has promulgated regulations which prohibit the presence of obstructions, such as tree limbs, within the navigable airspace known as an "approach slope," and because trees growing in the area which was clear-cut regularly attain heights which protrude into that airspace, the local and state laws requiring a permit to remove these trees are preempted. The court rejects this argument.

There exists "a strong presumption against federal preemption of state or local legislation." *Dowling v. Slotnik*, 244 Conn. 781, 794 (1998). Only when the federal government has shown a "clear and manifest" purpose to supersede state and local authority does preemption apply. *Id.*, at 795.

Consequently, it is assumed that a federal agency had no intent to preempt the exercise of local police power unless (1) the federal law or regulation expressly directs the ouster of local authority; (2) such intent should be inferred because the federal government has legislated comprehensively so as to occupy the entire field in question, leaving no room for local regulation in the area; or (3) the local regulation under scrutiny conflicts with federal rules because it is impossible to comply with both provisions or because the local law creates an obstacle to the accomplishment or execution of federal objectives. *Commission On Human Rights v. Sullivan Associates*, 250 Conn. 763, 772-73 (1999).

The parameters of the imaginary surfaces which compose the air corridor known as the approach slope are set forth in Federal Aviation Regulations (FAR) Part 77, 14 CFR § 77.1ff. It is these standards which the airport defendants claim preempt local regulation of the tree cutting which occurred in this case.

Part 77 sets forth criteria for determining whether objects, natural or manmade, protrude into the approach slope so as to obstruct air navigation. The text of Part 77

lacks any language which reasonably suggests that the standards contained therein for approach slope surfaces were meant to preempt state or local law regarding the objects which might intrude into the approach slope.

Next, the standards of Part 77 neither completely occupy nor exhaust the field of inland wetlands regulations as those regulations might burden or impinge upon the removal of protruding tree tops. Part 77 is bereft of discussion pertaining to wetland usage or environmental concerns generally. Those standards do not dictate how such natural obstacles should be pruned or removed or how often or what techniques ought to be employed in wetlands.

It had been held that the absence of such language in Part 77, which preemptive language is present in other FAR parts, implies that the standards of Part 77 neither prohibit the presence of such obstacles nor require the removal of any obstruction. *Catchings v. Glendale*, 743 P.2d 400, 404 (Ct. App. Ariz.1987). The criteria contained in Part 77 merely guide airports in evaluating whether a given object poses a hazard to air navigation. *Id.*

The mere fact that federal and local law deal with the same general topic creates no inference of federal preemption. See *Cox Cable Advisory Council v. DPUC*, 259 Conn. 56 (2002); *Dowling v. Slotnik*, supra; and *Commission On Human Rights v. Sullivan Associates*, supra. In the present case, the federal approach slope standards and the local and state wetlands provisions regulate disparate activities and are concerned with unrelated topics. The federal approach slope guidelines and state and local wetlands regulations touch only remotely and tangentially.

These local and federal regulations cover different ground. The wetlands regulations contain neither prescriptions nor proscriptions regarding navigable airspace or the removal of objects therefrom. The local regulations do not forbid the trimming or removal of trees growing in a

floodplain but simply require that a permit issue before such activity occurs. The state and local wetlands provisions neither conflict with nor render impossible the satisfaction of the standards propounded under Part 77.

Because the pertinent FAA rules fail explicitly to preempt local wetlands regulation, fail to occupy the field of wetland use near airports, and there is no irreconcilable conflict between the goals of Part 77 regarding safe approach slopes and local wetland permit requirements, no federal preemption exists to negate the airport defendants' liability in this case.

B.

MUNICIPAL ESTOPPEL

The airport defendants plead a second special defense alleging that the Commission is estopped from requiring the airport to obtain a permit before removing trees in the floodplains which adjoin the airport's property as long as the Connecticut Department of Transportation ("DOT") has characterized the presence of trees growing into the approach slope surfaces as hazardous to the safe use of the airport's runway. It should be observed that the DOT has been designated as the inspecting agent of the FAA with respect to safety inspections of this airport.

These defendants contend that municipal estoppel arises from two incidents in the past. First, in July 1999, about sixteen months before the clear-cutting, Ventres told Mellon that no wetlands permit was necessary to remove seven trees growing in wetlands located on airport property to the north of the tidal brook as long as the DOT had identified those trees as interfering with airport safety. Second, Ventres was present in the fall of 1999, during discussions between the airport and representatives of the Land Trust regarding a proposal to realign the runways. The realignment proposal included the removal of several trees south of the brook which divided the two properties. The

airport defendants claim that, during these negotiations, Ventres never voiced the need to obtain a permit in order to actuate the proposal.

Before invoking municipal estoppel, the airport defendants have a heavy burden of demonstrating the existence of the following elements:

> (1) that Ventres, the Commission's enforcement officer, did or said something calculated or intended to induce Mellon to believe that no permit was needed before clear-cutting 2.5 acres of floodplain forest located south of the tidal brook; and
> (2) that the airport defendants changed their position based on Ventres' acts or words. *Collins Group, Inc. v. Zoning Board of Appeals*, 78 Conn. App. 561, 578 (2003).

Municipal estoppel may be applied only:

> (1) with great caution;
> (2) if the resulting wetlands violation has been unjustifiably induced by Ventres; and
> (3) when special circumstances make it highly inequitable or oppressive to enforce the wetland regulations. *Id.*

As a general rule, estoppel is inappropriate against a public agency in the exercise of a governmental function. *Ammirata v. Zoning Board of Appeals*, 65 Conn. App. 606, 617 (2001). The court finds that the airport defendants have failed to prove, by a preponderance of the evidence, that Ventres' deeds or words were calculated or intended to induce Mellon to believe that the airport had municipal permission to clear-cut nearly 350 trees and sundry bushes on the Land Trust property. It strains credulity to posit that permission to cut seven trees on airport property wetlands justified a belief that Ventres was intending to confer blanket approval to denude 2.5 acres of floodplain forest at a different location

on Land Trust property without a permit or that Ventres intended to induce Mellon to believe that Ventres' imprimatur had been placed upon such an undertaking.

Regarding the second incident, Ventres merely acted as a mediator to facilitate negotiations among the relevant parties, viz, the airport, the Land Trust, and the Goodspeed Opera House. He was not engaged at the time in the enforcement of Commission regulations. Also, it is highly doubtful that a municipal agent's silence can estop the agency from enforcing its regulations. *Bauer v. Waste Management of Connecticut*, 234 Conn. 221, 245 (1995). The rendering of assistance by a municipal officer or agent as to some aspects of a project, without more, is insufficient to create an implied authorization to complete the project nor to perform other project-related activities so as to estop the municipality from enforcing its laws. *Zoning Commission v. Lescynski*, 188 Conn. 724, 733 (1982).

C.

UNCLEAN HANDS

The third special defense repeats the allegations regarding Ventres' participation in the negotiations in the fall of 1999 and attempts to invoke the doctrine of unclean hands. This defense fails for two reasons.

First, the same findings and reasoning which caused the court to reject the municipal estoppel claim apply to this defense. The airport defendants have failed to meet their burden of proving that Ventres acted with unclean hands in mediating negotiations regarding realignment of the runway.

Next, the doctrine of unclean hands recognizes that one seeking equitable redress must have acted equitably in the first instance. *Ridgefield v. Eppoliti Realty Co.*, 71 Conn. App. 321, 334 (2002). Although the Commission's prayer for relief includes a claim for "[a]ny other remedy at law or equity as

may appertain," the basis for liability is a statutory one under § 22a-44(b). Thus, only if the court were to consider ordering some equitable remedy outside of the relief legislatively provided by § 22a-44(b) would this doctrine even apply.

D.

VESTED RIGHTS

The fifth special defense alleges that the issuance, in 1975, of a permit by the Commission to cut trees to the south of the runway spawned a vested right to clear-cut the 2.5 acres in perpetuity. The plaintiffs have denied that such an expansive permit ever issued.

No credible evidence was adduced at trial supporting this allegation. Therefore, the airport defendants have failed to prove this special defense.

E.

PERMIT UNNECESSARY DEFENSE

In the sixth special defense these defendants assert that the airport has a vested right to cut trees for airport safety reasons, without first obtaining a permit, because such conduct was lawful when the airport was established in 1965, nearly a decade before the Commission came into being. This assertion is meritless.

Section 22a-42a(b) states, in part, that local inland wetlands regulations "shall become effective at such time as is fixed by the inland wetlands agency . . . ." Section 22a-42a(c)(1) provides "[o]n or after the effective date of the municipal regulations promulgated pursuant to section (b) of this section, no regulated activity shall be conducted upon any inland wetland or watercourse without a permit." (Emphasis added.)

In addition, the Commission regulations became effective October 17, 1974. These regulations also command

that "[n]o person shall henceforth conduct a regulated activity in a regulated area of the Town of East Haddam without first obtaining a permit for such activity from the Commission." (Emphasis added.)

Neither the statute nor the local regulations include a grandfather provision exempting tree cutting in a floodplain forest simply because, before 1974, that activity did or could lawfully occur without a permit. Indeed, the Commission's regulations do contain such a provision for residential building lots for which a building permit issued which predates July 1, 1974. The conspicuous absence of a similar exemption for other regulated activity compels the conclusion that no such vested right exists.

The remaining special defense pertains to remedy and not liability and will be addressed, if necessary, later in this decision.

III

CEPA CLAIMS

In X07-CV02-0080540, the DEP alleges three counts under § 22a-16, against Mellon and the airport for violations of CEPA, General Statutes § 22a-14ff. The second count was previously withdrawn. In X07-CV01-0076812, the Land Trust and Nature Conservancy have filed a CEPA cross claim against these defendants under § 22a-16. All of these CEPA claims are resolved in this section, and a recitation of additional facts is necessary to achieve this resolution.

The 2.5-acre clear-cut section of the floodplain along the Connecticut River, in proximity to Chapman's Pond, is part of a two-mile stretch of floodplain which is internationally recognized as having important environmental significance. The Chapman's Pond complex of wetlands and watercourses, including the clear-cut area, affords a rare combination of ecological factors and habitats in which a great diversity of wildlife can flourish. Upland forest,

floodplain forest, marshland, mudflats, tidal streams, ponds, and a major estuarial river coexist in a relatively small neighborhood. This ecological mosaic supplies several "edge" or transitional environments which appeal to a wide variety of flora and fauna.

The floodplain forest surrounding Chapman's Pond serves as a winter haven for, at times, as many as eighty bald eagles, a threatened species. Winter roosting bald eagles need tall trees with wide tops, ready accessibility to open water despite frigid conditions, a supply of fish in that open water, and seclusion from the sights and sounds of civilization. The Chapman's Pond area is a prime winter roosting area for bald eagles in the United States. Bald eagles have roosted in some of the trees which grew in the clear-cut area.

The floodplain forest area which was clear-cut formed a visual and auditory barrier separating Chapman's Pond from the airport and villages to the north. The clear-cutting broke the continuity of the natural buffer surrounding Chapman's Pond. The activity of the airport and the businesses and residences north of the pond now penetrates through the corridor left by the felling of the vegetation and disrupts the tranquility which had previously existed. The Goodspeed Bridge is now easily seen from the pond; a sight which had been obscured for decades before the clear-cutting.

The opening of the 2.5 acres of floodplain forest has exposed that land and the surrounding land to the invasion and proliferation by nonnative plant species. Lacking indigenous parasites and predators, these invasive species exploit the opportunity offered by the removal of the forest shade, and choke out the chance for native flora to thrive there. Japanese stilt grass, an invidious foreign annual, has spread rapidly over portions of the clear-cut acreage. Tree sprouts, which would otherwise rise from the stumps of the severed trees and attain mature height are being browsed by

deer at a pace which makes recovery of the forest in the area a tenuous proposition. In order to promote regrowth of the floodplain forest, abundant planting of indigenous trees and shrubs, protected by deer fencing, will be needed.

Floodplains, as the word suggests, are prone to inundation caused by the periodic or seasonal overflow of water which is normally contained by the banks of a water body. As mentioned above, the clear-cut area is subject to such flooding by the Connecticut River, and the formerly forested area, being composed of the stout, nonfrangible trunks of mature trees, acted to curb the velocity of the flowing flood water. The absence of this arboreal cushion poses the real risk that flood water from the Connecticut River will flow faster through the clear-cut area and deposit larger quantities of silt and debris into Chapman's Pond than would previously have been sustained. The ecology of Chapman's Pond would be altered should that scenario occur.

A.

THE FIRST COUNT

The first count of the DEP complaint asserts a violation of CEPA, under § 22a-16, for unreasonable impairment to wetlands and watercourses based on the absence of a permit as required by § 22a-42a(c)(1). The court concludes that the DEP has proven, by a preponderance of the evidence, that the actions of Mellon, on behalf of the airport, in directing the leveling of the 2.5 acres of floodplain forest, impaired the floodplain upon which the forest stood and the wetlands and watercourses nearby.

The second element that the DEP must establish is that this impairment was unreasonable. The regulation of wetland activity is set forth in Chapter 440 of Title 22a of the General Statutes. When a specific, environmental legislative scheme is "designed to govern the particular conduct that is the target of the action, that scheme gives substantive

content to the meaning of the word unreasonable as used in the context of an independent action under CEPA." *Waterbury v. Washington*, 260 Conn. 506, 557 (2002). Compliance or noncompliance with that regulatory scheme will determine whether the activity in question is unreasonable. *Id.*

Paragraph 19 of the first count of the DEP complaint unequivocally states that the airport defendants unreasonably impaired wetlands "[b]y, clear cutting trees . . . without a permit issued under the Inland Wetlands and Watercourses Act." Paragraph 18 specifically cites a violation of § 22a-42a(c)(1) as the basis for this CEPA count. Section 22a-42a(c)(1) is, as mentioned above, the statutory section which prohibits performing regulated acts in a wetlands without a permit. However, the failure to obtain a license or permit to engage in conduct which impinges on the environment cannot form the basis for a CEPA claim under § 22a-16. *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 138-45 (2003). Therefore, no valid CEPA claim is alleged in the first count, and no relief can be granted under that count.

B.

THE THIRD COUNT

The third count of the DEP complaint and the sixth count of the cross claim of the Land Trust and the Nature Conservancy allege unreasonable impairment or destruction of the floodplain forest, qua forest, by the clear-cutting. Based on the factual findings recited above, the court concludes that these parties have proven, by a preponderance of the evidence, that Mellon and the airport impaired and/or destroyed 2.5 acres of environmentally significant floodplain forest.

The court also finds that this clear-cutting was unreasonable under all of the circumstances. In the past, only trimming and selective cutting of trees was employed

to remove such obstacles to air navigation which the growing trees created. There existed no sound reason to abandon that conservative practice. To sever every tree and woody-stemmed bush, regardless of height and species, destroyed important floodplain forest excessively and unnecessarily. The airport could have complied with Part 77 of the FAA regulations regarding approach slope without the total decimation of woody vegetation between the tidal brook and Chapman's Pond.

Therefore, unless some special defense absolves them from liability, Mellon and the airport are legally responsible under the CEPA claims of both the DEP and the cross claimants.

C.

SPECIAL DEFENSES TO CEPA CLAIMS

The airport and Mellon interpose several special defenses to the CEPA claims. The first, fifth, sixth, and seventh special defenses raise federal preemption, estoppel, and vested rights claims similar to the special defenses asserted in the case brought by Ventres and rejected by the court in sections II.A, II.C, and II.D of this memorandum. For the same reasons the court rejects these special defenses in this case also.

1.

The second special defense alleges that the DEP can maintain no cause of action under CEPA for the clear-cutting of floodplain forest because the Inland Wetlands and Watercourses Act (IWWA) is the sole source of remedy for any impairment of wetlands. The airport defendants point to the fact that the IWWA was enacted after CEPA to support this claim.

Although specialized environmental legislation may create a scheme which delimits unreasonable impairment with respect to CEPA actions under § 22a-16, the CEPA

action is independent of the remedies afforded under that legislative scheme even though the regulated activity falls within that scheme. *Waterbury v. Washington*, supra, at 528-29. Consequently, even though the IWWA may provide recourse under its provision for any unauthorized impairment of wetlands, the DEP and the cross claimants are free to pursue the remedies available under CEPA in an independent action for unreasonable impairment of the floodplain forest.

2.

The third special defense posits that the DEP lacks authority to bring a CEPA claim which alleges unreasonable impairment of a floodplain forest. The purported basis for this defense is that the regulation of floodplain activity has been delegated by the state to the East Haddam Inland Wetlands and Watercourses Commission by virtue of § 22a-42.

Section 22a-42(a) declares that it is "the public policy of the state to require municipal regulation of activities affecting the wetlands and watercourses within the territorial limits of the various municipalities . . . ." Section 22a-42(c) mandates that each municipality establish an agency to carry out the dictates of the IWWA.

However, § 22a-16 explicitly confers concurrent authority on any "agency of the state or of a political subdivision thereof" to initiate suit for unreasonable impairment or destruction of "air, water and other natural resources." The airport defendants' argument flies directly in the face of the plain language of § 22a-16, and no other statutory provision nor case law militates against such concurrent authority to sue under CEPA. Therefore, the court finds this special defense meritless.

3.

The fourth special defense is that the felling of trees falls outside the purview of the IWWA, and, therefore, no claim under CEPA is viable. The airport defendants rely on the case of *Avalon Bay Communities, Inc. v. Inland Wetlands Commission*, 266 Conn. 150 (2003), as support for this proposition.

Reliance on *Avalon Bay Communities Inc.*, supra, is misplaced. First, that case was not a CEPA action, but instead it was an appeal from the denial of a local wetlands permit. Second, and more significantly, that case involved the local wetlands agency's attempt to regulate conduct performed outside of wetlands because of the impact of that conduct on the wetlands inhabitants. *Id.*, at 152 and 155. The applicant, in that case, had proposed no activity within the wetland, therefore no permit was required to engage in activity elsewhere. *Id.*

In contrast, the CEPA action in the present litigation is based on the impact of clear-cutting of all woody vegetation growing in a section of wetlands. The holding of *Avalon Bay Communities, Inc.*, supra, is inapposite.

Having determined that the DEP and the cross claimants satisfied their burden of proof under § 22a-16 and that the defendants have failed to demonstrate any valid special defense to this cause of action, the court holds that the clear-cutting at the behest of those defendants constituted a CEPA violation.

IV

REMAINING CROSS CLAIMS OF THE LAND TRUST AND NATURE CONSERVANCY

The Land Trust and Nature Conservancy also plead that the entry onto their land and clear-cutting of the trees and bushes growing there, ordered by Mellon on behalf of the

airport and without their permission, amounted to trespass to land and conversion.

A.

TRESPASS

In order for the cross claimants to prevail on their cross claim of trespass to land, they must prove, by a preponderance of the evidence, that they owned and possessed the 2.5 acres entered into and clear-cut by Evans at the request of Mellon and the airport. An action for trespass is possessory, and one in which title to land is usually only incidentally material. *McCullough v. Waterfront Park Assn., Inc.*, 32 Conn. App. 746, 749 (1993). However, where injunctive relief is sought, as in this case, ownership becomes an essential element of the cross claim. *Id.* The cross claimants can establish constructive possession by proving both title and the absence of exclusive possession in another. *Id.*

In the present case, the parties have stipulated that the Land Trust and Nature Conservancy have title and own the 2.5 acres which are the subject of this suit, and the court finds that no other person or entity held exclusive possession besides these cross claimants. Also, the court has found, as noted above, that Evans entered upon and clear-cut the acreage in question at the request of and on behalf of Mellon and the airport. Thus, the remaining issue to be resolved is whether Evans' entry and clear-cutting was wrongful.

In this regard, it is also undisputed that none of the airport defendants had permission from the cross claimants to enter this area or cut any vegetation and that the entry and cutting was done intentionally. Therefore, unless Mellon or the airport had the right, without permission from the cross claimants, to engage in that conduct on the land of the cross claimants, the actions of Evans between November 29 and December 5, 2000, on behalf of Mellon and the

airport comprised a trespass to land for which Mellon and the airport are liable.

B.

PRESCRIPTIVE EASEMENT

Mellon and the airport claim to have acquired such a right by way of a prescriptive easement.

General Statutes § 47-37 provides that a prescriptive easement may be acquired in land of another if the adverse use of that land "has been continued uninterrupted for fifteen years." The airport is required to prove that it and/or its predecessors in the chain of title of the airport land, as the dominant estate, entered and had cleared trees and brush on the servient estate, the 2.5 acres, under scrutiny, openly, visibly, continuously, and uninterruptedly for fifteen years and under a claim of right. *Roman v. Johnson*, 48 Conn. App. 498, 501 (1998).

"Use under a claim of right simply means without recognition of the rights of the owner of the servient tenement." *Id.* Unlike adverse possession, which requires proof of essential facts by clear and convincing evidence, a prescriptive easement may be proven by a preponderance of the evidence. *Simonds v. Shaw*, 44 Conn. App. 683, 687 (1997). The burden of proof is on the party claiming the benefit of the prescriptive easement. *Reynolds v. Soffer*, 190 Conn. 184, 188 (1983). Also, in Connecticut there is no presumption of permissive use that the party urging the prescriptive easement must overcome. *Id.*

With these principles in mind, the court makes the following additional findings of fact and rulings of law.

On December 3, 1970, the then owners of the properties to the north and south of the tidal brook, including the 2.5 acres in question, entered into a boundary agreement whereby these previous owners of the airport property quitclaimed to the owner of the land containing the 2.5 acres

that are the center of this dispute any "right, title, interest, claim and demand whatsoever" as to the land south of the tidal brook, which property includes the acreage upon which the prescriptive easement is claimed by the airport. As a result of that agreement, if the airport has prescriptive rights to the land south of the tidal brook, those rights must have begun to be acquired only after the date of that boundary agreement, viz. December 3, 1970. This is so because the agreement relinquished any interest, rights, or claims "whatsoever" which may have existed previously regarding that property.

Later, on June 7, 1978, the president of the airport, in a letter to the CT DOT Bureau of Aeronautics, acknowledged that the airport had no authority or right to remove or trim trees located south of the tidal brook without first obtaining the permission of the owner of that land. The court finds that, as of June 7, 1978, no entry upon and cutting of trees or brush was conducted, as of right, by the airport on the 2.5 acres in question.

Additionally, General Statutes § 47-27(b) states that "[n]o length of possession, use or occupancy of land belonging to a nonprofit land-holding organization shall create or continue any right in or to such land." (Emphasis added.) A "nonprofit land-holding organization" is defined by that section to include any nonprofit, nonstock corporation having as a principal purpose "the conservation and preservation of land." Both the Land Trust and Nature Conservancy come within this definition and have recourse to § 47-27(b) to thwart the acquisition of prescriptive easements over their land. Section 47-27 applies to prescriptive easements as well as to adverse possession claims. *Dalton Enterprises v. Boston and Maine Corp.*, 48 Conn App. 251, 253 (1998).

Left unresolved by our appellate level case law is the breadth of the phrase "create or continue any right in or to such land" (emphasis added). One might inquire whether

that phase means that a prescriptive easement previously acquired is lost if the servient estate is purchased by an entity qualifying for the benefit of § 47-27. Fortunately, this court can address and decide the issues of this case without answering that inquiry.

In *Nigro v. Boston Maine Corp.*, Superior Court, Waterbury J.D ., d.n. 106723 (July 21, 1993), Pittman, J. (9 Conn. L. Rptr. 491), the trial court held that the identical language of § 47-27(a), which affords similar protection to railroad property, cannot divest a prescriptive easement which was acquired before the effective date of that section of the statute, which was enacted in 1905. The court finds Judge Pittman's reasoning persuasive and holds that any prescriptive easement burdening the land in question acquired before the effective date of § 47-27(b) remains extant.

The effective date of § 47-27(b), as announced in P.A. 99-64, was May 27, 1999. The court concludes that the passage of P.A. 99-64, now codified as § 47-27(b), prohibits the acquisition of prescriptive easements on the cross claimant's land after May 27, 1999, but fails to extinguish any prescriptive rights fully gained before that date. Therefore, if the airport has any prescriptive easement to enter upon and cut vegetation south of the tidal brook on land owned and possessed by the cross claimants, that easement must have been acquired, if at all, by the passage of the requisite fifteen years entirely during the interval between June 7, 1978, and May 27, 1999.

In their post-trial brief, the Land Trust and Nature Conservancy contend that the execution of the boundary agreement forever disabled the owners of the airport property from acquiring any prescriptive rights regarding property south of the tidal brook. These cross claimants argue that the holding of *Crandall v. Gould*, 244 Conn. 583 (1998), mandates this conclusion. The court disagrees.

In *Crandall*, supra, a permanent injunction had issued in 1960 enjoining the claimants from using a private right of way. The claimants attempted to gain use of this easement, prescriptively, by repeated violations of the permanent injunction. Our Supreme Court rebuffed such an attempt and held that one who violates a court order cannot come to court expecting to obtain relief based on that violation. *Id.*, at 592. The Court refused to condone such contempt of court. *Id.*, at 593.

The facts of the present case are patently dissimilar. The airport defendants have violated no court order. While entering the cross claimants' land may contravene the rights to exclusive possession conveyed by the boundary agreement, every prescriptive easement is similarly acquired. If the execution of a deed foreclosed the possibility of a later-acquired prescriptive easement, it is difficult to envision when such an easement could ever be obtained.

The court finds that the owner of the airport property did acquire, prescriptively, some rights to enter and cut trees on the cross claimant's land south of the tidal brook during this interval. Sometime in 1983, Arthur D'Onofrio purchased the airport. Periodically throughout his ownership, which ended when he sold the property to Goodspeed Airport, LLC, in July 1999, D'Onofrio had his employees or agents trim or cut down some trees growing in the 2.5-acre section in question. He never sought permission from the landowners of that property or anyone else to engage in this activity.

The timing of the trimming or cutting was precipitated either by an inspection report authorized by the DOT, which had detected trees obstructing safe air navigation or, more commonly, by pilots complaining about these natural obstacles to take off and landing corridors. The nature and extent of the cutting and trimming by D'Onofrio varied from the mere pruning of the tops of taller tress to the

severance at ground level of certain trees. Sometimes only a few trees were affected, and, at other times, several trees were felled. As mentioned above, such activity occurred only as regularly as the growth of the trees dictated through official inspection or pilot complaint.

The cutting was always done openly, in daylight, and in a conspicuous manner involving the use of chainsaws. The effect of this periodic trimming and thinning on the maximum height of the tree canopy in the 2.5-acre section was apparent as can be seen in photographs of the area during D'Onofrio's ownership. The floodplain forest to the east and west of the subject area was perceptibly higher than the 2.5-acre section. This cutting was performed as regularly, continuously, and uninterruptedly as one would reasonably expect given the fact that the need for such cutting varied depending on tree regrowth rates. The circumstance that the actual entry and cutting was intermittent causes no gap in the running of the fifteen-year statutory period. *Simonds v. Shaw*, supra. The nature of the use demands that such be the case.

The court concludes that the dominant estate, the airport property, acquired a prescriptive easement to go onto the 2.5-acre area, on occasion, and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway. This adverse activity was done openly and continuously from 1983 to July 1999 and without recognition of the rights or interests of the possessor of this land.

C.

The court next determines whether the extent of that prescriptive was exceeded by or compatible with the clear-cutting which transpired between November 29 and December 5, 2000.

A prescriptive easement is more limited than an easement obtained by grant. *Gioielli v. Mallard Cove*

Condominium Ass'n, Inc., 37 Conn. App. 822, 831 (1995). The usage which creates the prescriptive easement "limits and qualifies it." *Id.* Prescriptive easements must impose as little burden on the servient estate as the purposes of the easement will reasonably permit. *Id.* One cannot expand the nature and extent of such an easement so as to increase unreasonably the imposition on the subordinate real estate.

If it is reasonable to assume that the increase in usage would have provoked the owner of the servient property to take action to interrupt the usage had the intensification occurred during the prescriptive period, the expanded usage exceeds the prescriptive easement acquired. *McCullough v. Waterfront Park Ass'n, Inc.*, supra, at 756. An increase in frequency of use can constitute such a provocation. *Id.*, at 756-57.

In the present case, it is abundantly obvious that clear-cutting every tree and woody-stemmed bush in the 2.5-acre site is a usage so dramatically different in extent than the felling of several trees every few years which occurred during the prescriptive period from 1983 to 1998, that one would reasonably expect the Land Trust and Nature Conservancy or any owner of the 2.5 acres to react, as well they did, to prevent such usage from happening again. The clear-cutting of the 2.5 acres was unreasonable conduct far beyond the right to cut the occasional protruding limb or tree, as had occurred during the prescriptive period. It was unforeseeable to the owners of the servient property that the periodic trimming and severing of a few or even several trees at a time, during the statutory fifteen years, would intensify to the level of stripping 2 .5 acres of all woody vegetation. Prescriptive rights confer no privilege to engage in unforeseeable acts which go beyond the activity conducted during the prescriptive years. *Gioielli v. Mallard Cove Condominium Assn, Inc.*, supra, at 832-33. Therefore, the airport defendants are liable for trespass to land for the clear-cutting activity described above.

D.

CONVERSION

The Land Trust and Nature Conservancy also allege that the clear-cutting constituted a conversion. The tort of conversion only applies to the wrongful appropriation of personal property. *Hartlin v. Cody*, 144 Conn. 499, 508 (1957). Real property includes land and the plants growing on that land. *McKelvey v. Creevey*, 72 Conn. 464, 467 (1900). While the severing of plants may be a trespass to land, as found in Section IV.C of this memorandum, it fails to embrace conversion, and the court decides this count of the cross-complaint in favor of the airport defendants.

E.

CUTPA

In their fifth cross claim, the Land Trust and Nature Conservancy allege a CUTPA violation. These parties have failed to brief this claim, and it is considered abandoned.

V.

CROSS CLAIMS OF THE AIRPORT DEFENDANTS

In X07-CV01-0076812, the airport and Mellon have filed cross claims against the Land Trust and Nature Conservancy. These cross claims sound in trespass, conversion, negligence, negligent nuisance, absolute nuisance, and indemnification. The essence of these claims is that the Land Trust and Nature Conservancy have allowed trees located on their land to grow into the approach slope above their property and refused to provide "unqualified access" to the airport to cut these trees.

Although the court has found that the airport has a limited prescriptive easement to enter the property of the Land Trust and Nature Conservancy and cut certain trees, this easement imposes no burden upon the owners of the

servient estate to do the cutting for the airport. The Land Trust and Nature Conservancy have merely allowed their property to remain in a natural state. It would serve no useful purpose to go beyond stating that these cross claims are devoid of factual support and legal merit.

VI.

REMEDIES

A.

As explicated in Section I of this memorandum, in X07-CV01-0076812, the Commission has established entitlement to the remedies afforded by § 22a-44(b). That section allows the court to assess civil penalties of up to $1000 per offense. Each day of a continuing offense is defined under § 22a-44(b) to be a separate offense. That provision also empowers the court to enjoin a continuing violation and order that the violation be corrected or removed. Additional facts are recited to address this issue.

On January 2, 2001, after learning of the clear-cutting, Ventres, by the power granted to him under § 22a-44(a), issued a cease and desist order which prohibited the airport defendants from engaging in any further regulated activity at the site. The order restated the Commission regulations definition of regulated activity which embraces any operation with or use of a wetland involving the removal or depositing of material in or alteration of the site.

In accordance with § 22a-44(a), the Commission scheduled a hearing, within ten days of issuance of the order, regarding whether the cease and desist order ought to remain in effect. However, because a sufficient number of Commission members or alternates recused themselves, no quorum was available on the date of the hearing. The hearing was never rescheduled. The Commission has taken no action with respect to the cease and desist order.

Section 22a-44(a) obligates the Commission to hear the facts and, within ten days of the completion of the hearing, notify the subject of the order that the original order remains in effect, that a revised order is in effect, or that the order has been withdrawn. That section states further that the "original order shall be effective upon issuance and shall remain in effect until the agency affirms, revises or withdraws the order."

The court holds that the original cease and desist order issued by Ventres in January 2001 remains in effect because that order was never acted upon by the Commission. That order prevents the airport defendants from implementing any corrective or remedial plan because such action would necessarily involve the removal and deposition of material at the site and would alter wetlands, albeit for environmentally beneficial purpose. Under these circumstances, the court cannot view the inaction of the airport defendants, after the date of the cease and desist order, as a continuing violation for purposes of assessing a civil penalty.

The court assesses against the airport defendants, jointly and severally, a civil penalty, under § 22a-44(b), of $500 per day for the thirty-five days from November 29, 2000 to January 2, 2001, the date the cease and desist order issued. The total civil penalty, therefore, equals $17,500, which is ordered to be paid to the DEP, as required by that subsection, within thirty days of the filing of this memorandum. The court also enjoins the Goodspeed Airport, LLC, and Timothy Mellon from engaging in any regulated activity on the land south of the tidal brook without obtaining a permit or approval from the Commission beforehand. This applies to each instance of activity unless the Commission issues a blanket permit.

Because the court has not assessed penalties after the date the cease and desist order issued, it is not necessary to

address the fourth special defense asserting that the plaintiffs failed to mitigate their damages.

The court will address the issues regarding an award of attorneys fees after a hearing at a later date.

The court declines to order any corrective or remedial action for two reasons. First, the land upon which such action would occur is owned by others. Second, the court will be issuing orders under the CEPA claims bearing on this issue.

B.

As determined in Section III, the DEP and the Land Trust and Nature Conservancy have proven a CEPA violation under § 22a-16. General Statutes § 22a-16a provides that "in lieu of any other penalties, damages or costs, or in addition to a reduced penalty, damages or costs awarded" the court "may order the defendant ... (3) to make financial contributions to an academic or government-funded research project related to environmental protection or conservation of natural resources ...."

The court exercises the prerogative afforded by § 22a-16a(3) and, in lieu of other penalties, damages, or costs, orders the defendants to make a financial contribution of $50,000 to an academic or government-funded research project related to environmental protection or conservation of natural resources, which recipient will be identified by the DEP. The payment will be made within six months of the date the DEP notifies the court and the parties of the entity receiving the contribution.

The court chose this option rather than ordering the adoption of a particular restoration or remediation plan for the following reasons. The violators are not the landowners, and the history of a lack of cooperation among the parties makes it difficult to reach any consensus regarding the best method to accomplish the goals of restoration and/or

remediation. Indeed, no party proposes a replication of the conditions which existed before the clear-cutting occurred. That situation results because invasive species, such as ailanthus trees, had already established themselves at this site for many years, and it is highly desirable ecologically to eradicate such invaders and replace them with native species. Also, any plan may involve replanting, the use of deer fencing, the application of herbicides against foreign species, etc. which actions are regulated activity requiring approval of the Commission after a hearing. The financial contribution solution appears to the court to be the most practical, reasonable, and balanced remedy to apply under all the circumstances of this case. It is expected that the DEP will identify a recipient connected to the Chapman's Pond preserve, if possible.

Again, the issues of an amount of attorneys fees and expenses will be addressed after a hearing at a later date.

C.

Next, the court determines the appropriate damages arising from the trespass cross claim of the Land Trust and Nature Conservancy. The cross claimants submitted no evidence as to the value of the severed trees as cut wood nor as to any diminution of the value of the land proximately caused by the clear-cutting. Instead, the cross claimants, at trial, urged the court to award treble damages under General Statutes § 52-560 based on the replacement value of the trees.

The cross claimants concede that their claim for damages is controlled by the holding in *Stanley v. Lincoln*, 75 Conn. App. 781 (2003). That case reaffirmed the long-standing interpretation that § 52-560 embodies the common-law measure of damages for the cutting down of trees on another's land. *Id.*, at 785-86. Damages recoverable for the unlawful felling of trees, under § 52-560, are either the value of the trees as cut wood, such as for lumber or firewood, or

the diminishment in value of the property which resulted from the cutting. *Id.* Replacement cost is an improper measure of damage. *Id.*, at 789. Remedies, other than that provided under § 52-560, for the unauthorized severing of trees will not be implied. *Id.*, at 790.

Essentially, the cross claimants want this court to abrogate the measure of damages principles recently reiterated in *Stanley v. Lincoln*, supra, because they wish to make "new law." Any decision to abandon recent precedent is the function of an appellate tribunal and not that of the trial court.

In the absence of any evidence regarding the proper measure of damages, the cross claimants are entitled to recover only nominal damages for the "mere unlawful entry upon land." *Id.*, at 785. Accordingly, the court awards nominal damages of one dollar on the trespass cross claim.

The court does, however, enjoin the Goodspeed Airport, LLC, and Timothy Mellon and their agents or employees from entering the cross claimant's land, without the owner's consent, except as is consistent with the prescriptive easement usage which the court has found to exist in Sections IV.B and IV.C of this memorandum.

APPENDIX D

SUPREME COURT
STATE OF CONNECTICUT

No. SC 17280

JAMES VENTRES ET AL.

v.

GOODSPEED AIRPORT, LLC, ET AL. : October 25, 2005

ORDER

The motion of the Defendants-Appellants Goodspeed Airport, LLC, Timothy Mellon and Timothy Evans, filed September 9, 2005, for reconsideration, having been presented to the Court, it is hereby ORDERED denied.

By the Court,

/s/ Michele T. Angers
Chief Clerk

Notice Sent: October 26, 2005

APPENDIX E

SUPREME COURT
STATE OF CONNECTICUT

No. SC 17280

JAMES VENTRES ET AL.

v.

GOODSPEED AIRPORT, LLC, ET AL.

: November 29, 2005

ORDER

The motion of the Defendants, Goodspeed Airport, LLC, Timothy Mellon and Timothy Evans, filed November 7, 2005, for stay of execution, having been presented to the Court, it is hereby ORDERED granted until the expiration of the time to petition to the United States Supreme Court or, if a petition is filed, until that Court has taken action in this case, either by a denial of the petition for certiorari or, if applicable, by a decision on the merits.

Katz and Vertefeuille, JJ., did not participate in the consideration or decision of the motion.

By the Court,

/s/ Michele T. Angers
Chief Clerk

Notice Sent: November 29, 2005

APPENDIX F

SUPREME COURT
STATE OF CONNECTICUT

No. SC 17281

CONNECTICUT DEPARTMENT
OF ENVIRONMENTAL PROTECTION
v.
TIMOTHY MELLON ET AL. October 25, 200[5]

ORDER

The motion of the defendants-appellants Timothy Mellon and Goodspeed Airport, LLC, filed September 9, 2005, for reconsideration, having been presented to the Court, it is hereby ORDERED denied.

By the Court,

/s/ Michele T. Angers
Chief Clerk

Notice Sent: October 26, 2005

APPENDIX G

SUPREME COURT
STATE OF CONNECTICUT

No. SC 17281

CONNECTICUT DEPARTMENT
OF ENVIRONMENTAL PROTECTION

v.

TIMOTHY MELLON ET AL. : November 29, 2005

ORDER

The motion of the defendants, Goodspeed Airport, LLC and Timothy Mellon, filed November 7, 2005, for stay of execution, having been presented to the Court, it is hereby ORDERED granted until the expiration of the time to petition to the United States Supreme Court or, in a petition is filed, until that Court has taken action in this case, either by a denial of the petition for certiorari or, if applicable, by a decision on the merits.

Vertefeuille, J., did not participate in the consideration or decision of the motion.

By the Court,

/s/ Michele T. Angers
Chief Clerk

Notice Sent: November [2]9, 2005

APPENDIX H

Federal Aviation Statutes and Regulations

49 U.S.C. § 40102. Definitions

(a) General Definitions.—In this part—

(30) "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

49 U.S.C. § 40103. Sovereignty and use of airspace

(a) Sovereignty and public right of transit.—(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace.

(b) Use of airspace.—(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for—

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 41713. Preemption of authority over prices, routes, and service

(b) Preemption.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce any law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

* * * * *

Code of Federal Regulations

Title 14 — Aeronautics and Space

Chapter 1 — Federal Aviation Administration, Department of Transportation

PART 77 — OBJECTS AFFECTING NAVIGABLE AIRSPACE

Subpart A — General

§ 77.1 Scope.

This part:

(a) Establishes standards for determining obstructions in navigable airspace;

(b) Sets forth the requirements for notice to the Administrator of certain proposed construction or alteration;

(c) Provides for aeronautical studies of obstructions to air navigation, to determine their effect on the safe and efficient use of airspace;

(d) Provides for public hearings on the hazardous effect of proposed construction or alteration on air navigation; and

(e) Provides for establishing antenna farm areas.

§ 77.2 Definition of terms.

For the purpose of this part:

Airport available for public use means an airport that is open to the general public with or without a prior request to use the airport.

A seaplane base is considered to be an airport only if its sea lanes are outlined by visual markers.

Nonprecision instrument runway means a runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved, or planned, and for which no precision approach facilities are planned, or indicated on an FAA planning document or military service military airport planning document.

Precision instrument runway means a runway having an existing instrument approach procedure utilizing an Instrument Landing System (ILS), or a Precision Approach Radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated by an FAA approved airport layout plan; a military service approved military airport layout plan; any other FAA planning document, or military service military airport planning document.

Utility runway means a runway that is constructed for and intended to be used by propeller driven aircraft of 12,500 pounds maximum gross weight and less.

Visual runway means a runway intended solely for the operation of aircraft using visual approach procedures, with no straight-in instrument approach procedure and no instrument designation indicated on an FAA approved airport layout plan, a military service approved military airport layout plan, or by any planning document submitted to the FAA by competent authority.

§ 77.3 Standards.

(a) The standards established in this part for determining obstructions to air navigation are used by the Administrator in:

(1) Administering the Federal-aid Airport Program and the Surplus Airport Program;

(2) Transferring property of the United States under section 16 of the Federal Airport Act;

(3) Developing technical standards and guidance in the design and construction of airports; and

(4) Imposing requirements for public notice of the construction or alteration of any structure where notice will promote air safety.

(b) The standards used by the Administrator in the establishment of flight procedures and aircraft operational limitations are not set forth in this part but are contained in other publications of the Administrator.

§ 77.5 Kinds of objects affected.

This part applies to:

(a) Any object of natural growth, terrain, or permanent or temporary construction or alteration, including equipment or materials used therein, and apparatus of a permanent or temporary character; and

(b) Alteration of any permanent or temporary existing structure by a change in its height (including appurtenances), or lateral dimensions, including equipment or materials used therein.

Subpart C—Obstruction Standards

§ 77.21 Scope.

(a) This subpart establishes standards for determining obstructions to air navigation. It applies to existing and proposed manmade objects, objects of natural growth, and terrain. The standards apply to the use of navigable airspace by aircraft and to existing air navigation facilities, such as an air navigation aid, airport, Federal airway, instrument approach or departure procedure, or approved off-airway route. Additionally, they apply to a planned facility or use, or a change in an existing facility or use, if a proposal therefor is on file with the Federal Aviation Administration or an appropriate military service on the date the notice required by § 77.13(a) is filed.

(b) At those airports having defined runways with specially prepared hard surfaces, the primary surface for each such runway extends 200 feet beyond each end of the runway. At those airports having defined strips or pathways that are used regularly for the taking off and landing of aircraft and have been designated by appropriate authority as runways, but do not have specially prepared hard surfaces, each end of the primary surface for each such runway shall coincide with the corresponding end of the runway. At those airports, excluding seaplane bases, having a defined landing and takeoff area with no defined pathways for the landing and taking off of aircraft, a determination shall be made as to which portions of the landing and takeoff area are regularly used as landing and takeoff pathways. Those pathways so determined shall be considered runways and an appropriate primary surface as

defined in § 77.25(c) will be considered as being longitudinally centered on each runway so determined, and each end of that primary surface shall coincide with the corresponding end of that runway.

(c) The standards in this subpart apply to the effect of construction or alteration proposals upon an airport if, at the time of filing of the notice required by § 77.13(a), that airport is—

(1) Available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement; or

(2) A planned or proposed airport or an airport under construction, that is the subject of a notice or proposal on file with the Federal Aviation Administration, and, except for military airports, it is clearly indicated that that airport will be available for public use; or,

(3) An airport that is operated by an armed force of the United States.

§ 77.23 Standards for determining obstructions.

(a) An existing object, including a mobile object, is, and a future object would be, an obstruction to air navigation if it is of greater height than any of the following heights or surfaces:

(1) A height of 500 feet above ground level at the site of the object.

(2) A height that is 200 feet above ground level or above the established airport elevation, whichever is higher, within 3 nautical miles of the established reference point of an airport, excluding heliports, with its longest runway more than 3,200 feet in actual length, and that height increases in the proportion of 100 feet for each additional

nautical mile of distance from the airport up to a maximum of 500 feet.

(3) A height within a terminal obstacle clearance area, including an initial approach segment, a departure area, and a circling approach area, which would result in the vertical distance between any point on the object and an established minimum instrument flight altitude within that area or segment to be less than the required obstacle clearance.

(4) A height within an en route obstacle clearance area, including turn and termination areas, of a Federal airway or approved off-airway route, that would increase the minimum obstacle clearance altitude.

(5) The surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.25, § 77.28, or § 77.29. However, no part of the take-off or landing area itself will be considered an obstruction.

(b) Except for traverse ways on or near an airport with an operative ground traffic control service, furnished by an air traffic control tower or by the airport management and coordinated with the air traffic control service, the standards of paragraph (a) of this section apply to traverse ways used or to be used for the passage of mobile objects only after the heights of these traverse ways are increased by:

(1) Seventeen feet for an Interstate Highway that is part of the National System of Military and Interstate Highways where overcrossings are designed for a minimum of 17 feet vertical distance.

(2) Fifteen feet for any other public roadway.

(3) Ten feet or the height of the highest mobile object that would normally traverse the road, whichever is greater, for a private road.

(4) Twenty-three feet for a railroad, and,

(5) For a waterway or any other traverse way not previously mentioned, an amount equal to the height of the highest mobile object that would normally traverse it.

§ 77.25 Civil airport imaginary surfaces.

The following civil airport imaginary surfaces are established with relation to the airport and to each runway. The size of each such imaginary surface is based on the category of each runway according to the type of approach available or planned for that runway. The slope and dimensions of the approach surface applied to each end of a runway are determined by the most precise approach existing or planned for that runway end.

(a) *Horizontal surface.* A horizontal plane 150 feet above the established airport elevation, the perimeter of which is constructed by swinging arcs of specified radii from the center of each end of the primary surface of each runway of each airport and connecting the adjacent arcs by lines tangent to those arcs. The radius of each arc is:

(1) 5,000 feet for all runways designated as utility or visual;

(2) 10,000 feet for all other runways. The radius of the arc specified for each end of a runway will have the same arithmetical value. That value will be the highest determined for either end of the runway. When a 5,000-foot arc is encompassed by tangents connecting two adjacent 10,000-foot arcs, the 5,000-foot arc shall be disregarded on the construction of the perimeter of the horizontal surface.

(b) *Conical surface.* A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(c) *Primary surface.* A surface longitudinally centered on a runway. When the runway has a specially prepared hard

surface, the primary surface extends 200 feet beyond each end of that runway; but when the runway has no specially prepared hard surface, or planned hard surface, the primary surface ends at each end of that runway. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline. The width of a primary surface is:

(1) 250 feet for utility runways having only visual approaches.

(2) 500 feet for utility runways having nonprecision instrument approaches.

(3) For other than utility runways the width is:

(i) 500 feet for visual runways having only visual approaches.

(ii) 500 feet for nonprecision instrument runways having visibility minimums greater than three-fourths statute mile.

(iii) 1,000 feet for a nonprecision instrument runway having a nonprecision instrument approach with visibility minimums as low as three-fourths of a statute mile, and for precision instrument runways.

The width of the primary surface of a runway will be that width prescribed in this section for the most precise approach existing or planned for either end of that runway.

(d) *Approach surface.* A surface longitudinally centered on the extended runway centerline and extending outward and upward from each end of the primary surface. An approach surface is applied to each end of each runway based upon the type of approach available or planned for that runway end.

(1) The inner edge of the approach surface is the same width as the primary surface and it expands uniformly to a width of:

(i) 1,250 feet for that end of a utility runway with only visual approaches;

(ii) 1,500 feet for that end of a runway other than a utility runway with only visual approaches;

(iii) 2,000 feet for that end of a utility runway with a nonprecision instrument approach;

(iv) 3,500 feet for that end of a nonprecision instrument runway other than utility, having visibility minimums greater than three-fourths of a statute mile;

(v) 4,000 feet for that end of a nonprecision instrument runway, other than utility, having a nonprecision instrument approach with visibility minimums as low as three-fourths statute mile; and

(vi) 16,000 feet for precision instrument runways.

(2) The approach surface extends for a horizontal distance of:

(i) 5,000 feet at a slope of 20 to 1 for all utility and visual runways;

(ii) 10,000 feet at a slope of 34 to 1 for all nonprecision instrument runways other than utility; and,

(iii) 10,000 feet at a slope of 50 to 1 with an additional 40,000 feet at a slope of 40 to 1 for all precision instrument runways.

(3) The outer width of an approach surface to an end of a runway will be that width prescribed in this subsection for the most precise approach existing or planned for that runway end.

(e) *Transitional surface.* These surfaces extend outward and upward at right angles to the runway centerline and the runway centerline extended at a slope of 7 to 1 from the sides of the primary surface and from the sides of the approach surfaces. Transitional surfaces for those portions

of the precision approach surface which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at right angles to the runway centerline.

* * * * *

Advisory Circular No. 150/5300-13

Chapter 2. AIRPORT GEOMETRY

* * *

211. OBJECT CLEARING CRITERIA. Safe and efficient operations at an airport require that certain area on an near the airport be clear of objects or restricted to objects with a certain function, composition, and/or height. The object clearing criteria subdivides the 14 CFR Part 77, Subpart C, airspace and the object free area (OFA) ground area by type of objects tolerated within each subdivision.

a. Standards. Object clearance requirements are as follows:

* * *

(6) 14 CFR Part 77 Obstructions to Air Navigation. Obstructions to air navigation must be removed unless an FAA aeronautical study, based on proposed operations, determined otherwise. To determine otherwise, the FAA must find no substantial adverse effect as defined in Order 7400.2, Procedures for Handling Airspace Matters, Chapter 7, Evaluating Aeronautical Effect, Section 1, General. The FAA, normally, limits aeronautical studies of existing objects to obstructions to air navigation which are not included in the criteria cited in paragraphs 211a(1) though (5).

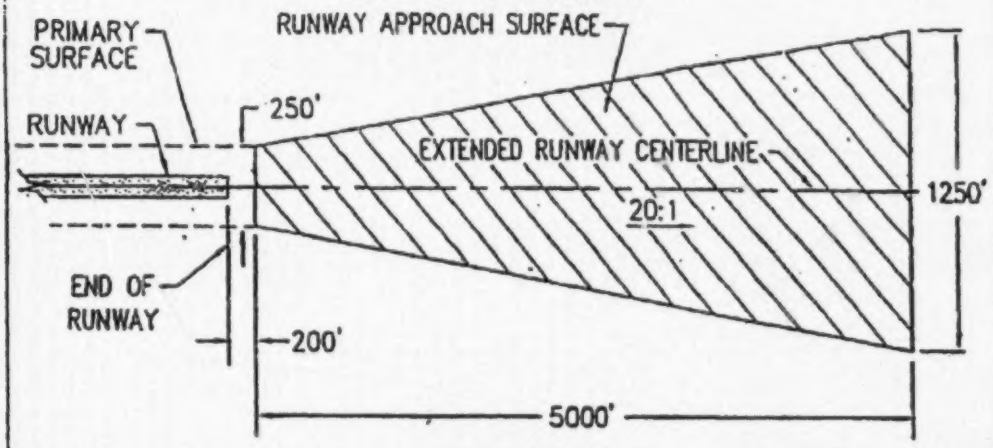
212. RUNWAY PROTECTION ZONE (RPZ). The RPZ's function is to enhance the protection of people and property on the ground. This is achieved through airport owner control over RPZs. Such control includes clearing RPZ areas (and maintaining them clear) of incompatible objects and activities. Control is preferably exercised through the acquisition of sufficient property interest in the RPZ.

a. Standards.

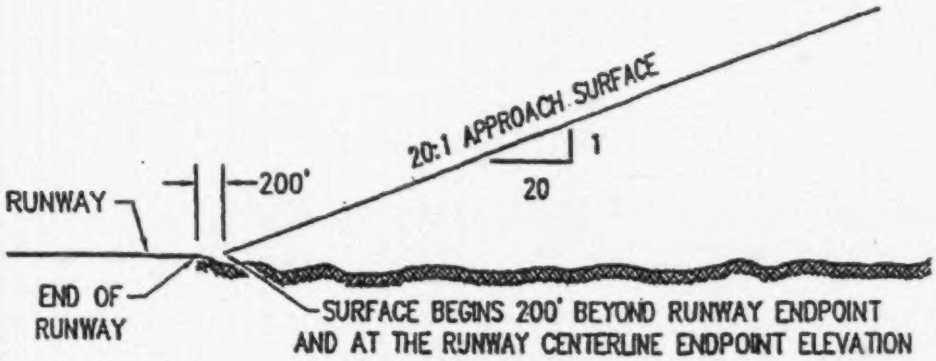
(1) RPZ Configuration/Location. The RPZ is trapezoidal in shape and centered about the extended runway centerline. The controlled activity area and a portion of the Runway OFA are the two components of the RPZ (see figure 2-3). The RPZ dimension for a particular runway end is a function of the type of aircraft and approach visibility minimum associated with that runway end. Table 204 provides standard dimensions for RPZs. Other than with a special application of declared distances, the RPZ begins 200 feet (60m) beyond the end of the area usable for takeoff or landing. With a special application of declared distances, see Appendix 14, separate approach and departure RPZs are required for each runway end.

RUNWAY APPROACH SURFACE FOR

A "UTILITY" RUNWAY WITH A "VISUAL" APPROACH AND A 250' WIDE PRIMARY SURFACE



PLAN VIEW



SIDE VIEW

RUNWAY APPROACH SURFACE: A SLOPING TRAPEZOIDAL PLANE LONGITUDINALLY CENTERED ON THE EXTENDED RUNWAY CENTERLINE AND EXTENDING OUTWARD AND UPWARD FROM THE END OF THE RUNWAY PRIMARY SURFACE. THIS SURFACE IS MEANT TO PROVIDE AIRCRAFT AN UNOBSTRUCTED APPROACH PATH AND SHOULD BE FREE OF ANY PENETRATIONS BY OBJECTS EXCEPT FOR FAA APPROVED FRANGIBLE NAVAIDs. THE TERM NAVAIDs INCLUDES ELECTRICAL AND VISUAL AIR NAVIGATION AIDS. LIGHTS, SIGNS, AND THEIR SUPPORTING EQUIPMENT.

UTILITY RUNWAY: A RUNWAY USED BY PROPELLER DRIVEN AIRCRAFT WITH A MAXIMUM CROSS WEIGHT OF 12,500 POUNDS OR LESS.

RUNWAY WITH A VISUAL APPROACH: A RUNWAY INTENDED SOLELY FOR THE OPERATION OF AIRCRAFT USING VISUAL APPROACH PROCEDURES.

Matthew J. Kelly - DOT

Certified By: [signature]

ASI Date: 2-17-04

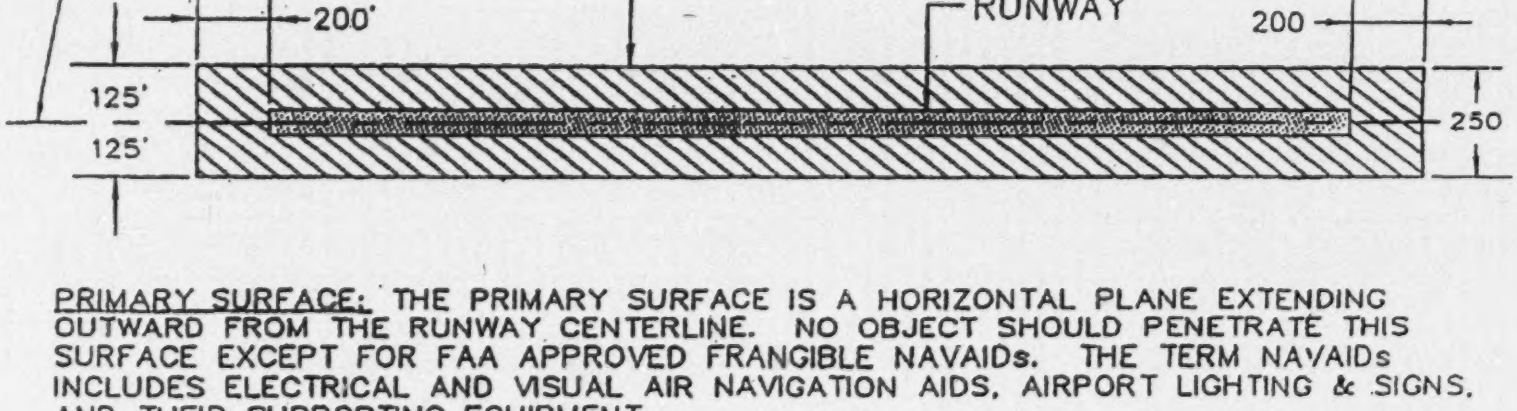
SOURCE: FEDERAL AVIATION REGULATIONS PART 77

Approach Surface

Primary Surface

Certified By: Matthew J. Kelly - DOT
Date: 2-17-04

250' WIDE PRIMARY SURFACE FOR UTILITY RUNWAYS WITH VISUAL APPROACH AT BOTH ENDS



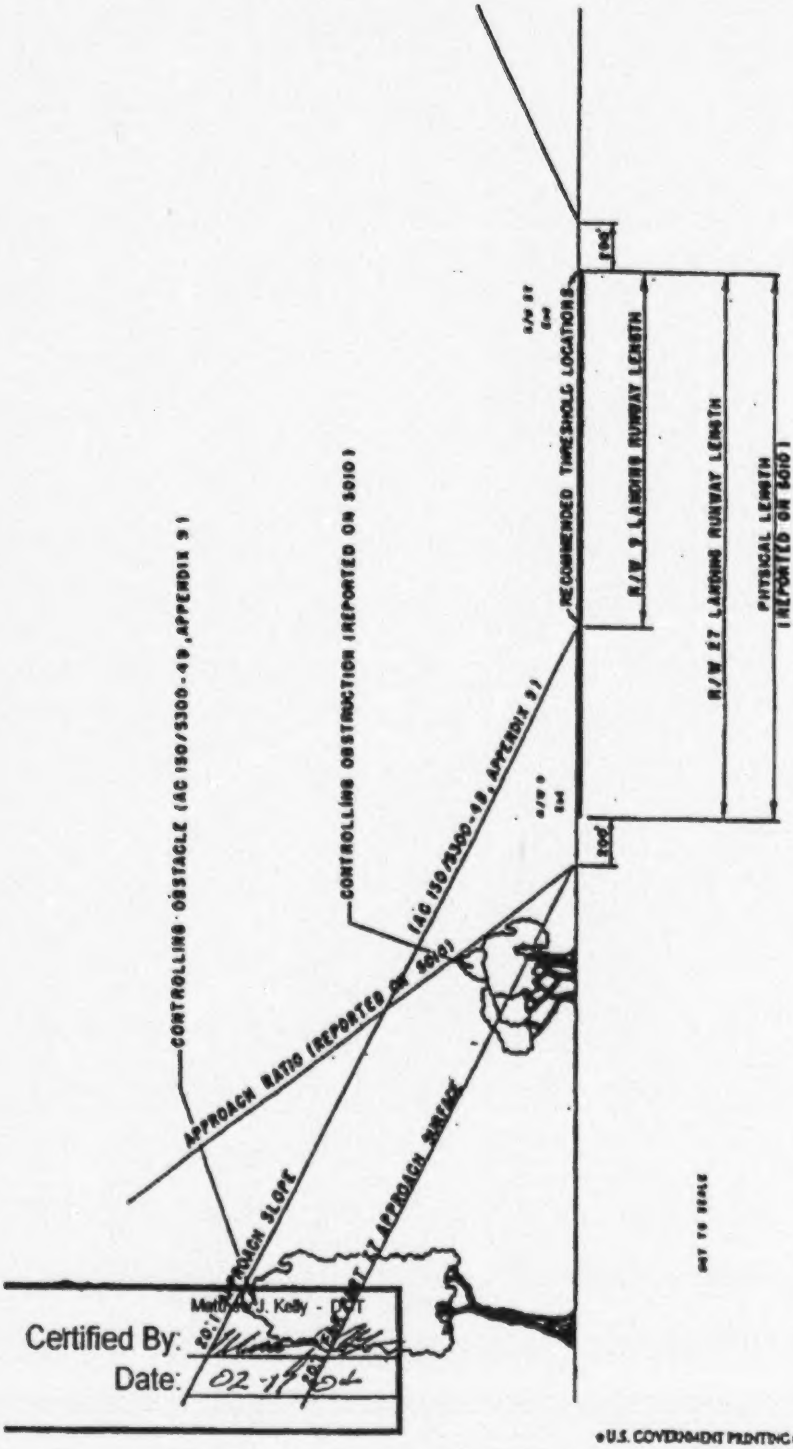
PRIMARY SURFACE: THE PRIMARY SURFACE IS A HORIZONTAL PLANE EXTENDING OUTWARD FROM THE RUNWAY CENTERLINE. NO OBJECT SHOULD PENETRATE THIS SURFACE EXCEPT FOR FAA APPROVED FRANGIBLE NAVAIDs. THE TERM NAVAIDs INCLUDES ELECTRICAL AND VISUAL AIR NAVIGATION AIDS, AIRPORT LIGHTING & SIGNS, AND THEIR SUPPORTING EQUIPMENT

PSVIS

SOURCE: FAA FAR PART 77

APPENDIX 10. METHODOLOGY FOR MEASURING 20:1 LANDING LENGTH

Calculation of Approach Slope



Certified By: Matthew J. Kelly - DOT

Date: 02-17-94

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No. 05-1088

In The Supreme Court of the United States

GOODSPEED AIRPORT, LLC, *et al.*,

Petitioners,

v.

JAMES VENTRES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the United States Supreme Court should exercise its certiorari jurisdiction where the Petitioner claims federal preemption but Petitioner's counsel below conceded that there is no preemption, the airport in question lacks the property right to remove the trees in question, and the aviation regulations in question provide for compliance without the need to remove trees.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents, the East Haddam Land Trust and The Nature Conservancy, state that they have no parent corporations and that no publicly traded companies own 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

This case arose because the Petitioners clear-cut to the ground some 2.6 acres of trees to the south of Goodspeed Airport in East Haddam, Connecticut. The 2.6 acres of forest at the heart of the litigation are owned by the East Haddam Land Trust and The Nature Conservancy (collectively, the "Land Trusts"). The land is part of a significant natural preserve surrounding Chapman Pond. *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 111 (2005). A variety of litigation arose from the cutting. *See, e.g., Goodspeed Airport, LLC v. East Haddam Land Trust, Inc.*, No. 3:01cv408, 2005 U.S. Dist. LEXIS 11558 (D. Conn. June 13, 2005) (dismissing airport's claim of due process violation), *aff'd*, 2006 U.S. App. LEXIS 2180 (2d Cir. Jan. 27, 2006).

The litigation which is the subject of the Petition arose from two cases filed in the Connecticut State Courts. In the first case, the East Haddam Inland Wetlands and Watercourses Commission (the "IWWC") brought claims under Connecticut's Wetlands statute, Conn. Gen. Stat. § 22a-36, *et seq.*, seeking restoration of the affected property and civil penalties. The second action was brought by the Connecticut Department of Environmental Protection (the "DEP") under the Connecticut Environmental Protection Act, Conn. Gen. Stat. § 22a-16, *et seq.* ("CEPA"). The Land Trusts were made defendants to each of these two cases, which were tried together, since both the IWWC and DEP were seeking to have the Land Trusts' property restored.

In the litigation that was brought by the IWWC, the Petitioners and the Land Trusts filed a variety of cross-claims. For purposes of the Petition, the relevant

cross-claims were the ones brought by the Land Trusts which sounded in CEPA and in trespass. The Land Trusts prevailed on their CEPA claim and were awarded the same relief awarded to the DEP. *Ventres*, 275 Conn. at 135. CEPA provides for declaratory and equitable relief for the protection of the public trust in the air, water or other natural resources of the state from unreasonable pollution, impairment or destruction. Conn. Gen. Stat. § 22a-16.

In connection with the trespass claim, the trial court found that the Petitioners have a limited prescriptive easement to cut or trim trees based on either a runway with an approach slope ranging between 13:1 or 14:1, or a runway with a 340 foot displaced threshold. *Ventres*, 275 Conn. at 125-26. A displaced threshold results from moving the spot at which landings can take place, thereby effectively shortening its length. *Id.* at 123 n.22. Throughout its history, Goodspeed Airport regularly operated with a displaced threshold that was in place apparently as a result of the trees that were growing on the Trust Parties' property. *Id.* at 126 n.24. It was only upon Mr. Mellon's purchase of the airport in 1999 that the displaced threshold ceased to be an option.

During oral argument before the Connecticut Supreme Court, counsel for the Petitioners was asked whether federal law gave the Petitioners a right to cut the trees. He conceded that it did not. *See Ventres*, 275 Conn. at 117; *see also* transcript dated April 14, 2005 of the oral argument before the Connecticut Supreme Court at page 21, appendix at App. 2. Based on the concession of counsel, the Connecticut Supreme Court determined that it did not need to address the question of federal preemption. *Ventres*, 275 Conn. at 132, n.27.

SUMMARY OF ARGUMENT

This Court should not exercise its discretionary jurisdiction over this case, where the Petitioners' claim of federal preemption was not squarely addressed below, because the plaintiffs lack both a property right and a federal duty to undertake the clear-cutting that is the basis of the decisions below.

ARGUMENT

The Petitioners have acknowledged that federal law does not give them the right to cut any trees on the Land Trusts' property; that limited right comes from state property law. *Ventres*, 275 Conn. at 117. In its decision, the Connecticut Supreme Court identified a limited prescriptive easement in favor of the airport to maintain an approach slope to a runway with a 340 foot displaced threshold. *Id.* at 126 n.24. The prescriptive easement does not permit the type of clear-cutting that is the focus of the litigation. *Id.* at 127. Thus, the Petitioners lack any right to clear-cut the property. In the absence of such a right, the Petitioners are, in effect, seeking an advisory opinion from this Court. *See Ventres*, 275 Conn. at 132 n.28 (the Respondents had not claimed below that cutting at the boundaries of the easement would result in a CEPA violation; therefore these claims were not before the court).

In other words, while it is conceivable that there might have been a case for federal preemption if the Petitioners had cut precisely along the prescriptive easement boundary, and the court still returned a judgment in favor of the Land Trusts (and the State of Connecticut)

that the limited cutting constituted "unreasonable impairment" under CEPA, that case is not before this Court. The Petitioners did not limit their cutting to the contours of the easement. Instead, they dramatically and unreasonably exceeded the bounds of the easement, and it was this wanton act which in large measure led to the finding that the cutting was unreasonable and therefore in violation of CEPA. *See Ventres*, 275 Conn. at 136 n.29.

Nonetheless, the Petitioners urge this Court to provide a federal shield for their actions. They do so despite the fact that the decisions of the Connecticut Supreme Court are readily distinguishable from the cases which the Petitioners cite as being contrary on the preemption issue. Both of the cases that the Petitioners cite as conflicting with the decisions below involve actions that the airports involved undertook on property that they owned. *See United States v. City of New Haven*, 496 F.2d 452, 453 (2d Cir. 1974) (New Haven acquired additional land in the Town of East Haven to establish a clear zone at the end of the runway.); *see also Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338, 1339 (9th Cir. 1992) ("The ordinance at issue applies exclusively to a 54-acre parcel of land owned by the Burbank Airport and located within the jurisdiction of the City of Los Angeles.") This fact is in clear contrast to the Petitioners' lack of ownership of the Land Trusts' property, and its lack of the right to clear-cut that property. Since the lack of a property right to clear-cut the trees was the basis for the decisions on the preemption issue, it is difficult to see how the reasoning in the cited questions "stands in stark contrast" to the decisions below, or give rise to a conflict that this Court needs to resolve.

In addition to lacking a property right to cut the trees, the simple fact is that the Petitioners were under no federal duty to cut the trees. (*See, e.g.*, September 28, 1999 Letter from Goodspeed Airport to Connecticut Department of Transportation (Trial Exhibit 220) indicating that the items identified by the Connecticut Department of Transportation had been "corrected" as of Sept. 28, 1999.) (Trust Parties' Connecticut Supreme Court Appendix, hereinafter "Trust App." at 70). The Airport had received no order from either the FAA or the Connecticut Department of Transportation to cut the trees on the Land Trusts' properties. Moreover, the Airport had never been shut down for failure to maintain the glide path set forth in Federal Aviation Regulations ("FAR") Part 77, 14 CFR § 77.25 ("Part 77"). To the contrary, the airport had only three (3) inspection periods out of a total of fourteen (14) inspections over the entire 1978 through 1999 period in which it did not have a non-conforming approach slope, a displaced threshold, or both. Testimony of William DePuy,[1] Mar. 5, 2004, Tr. at 12 (Trust App. at 61).

Notwithstanding the airport's history with respect to its glide path, the Petitioners did not make any attempt to limit their cutting to anything resembling the conditions that had previously existed at the site, or even to the imaginary surfaces set forth in Part 77. Moreover, FAR Part 77 does not actually prohibit obstacles, or require the removal of obstacles. *Catchings v. Glendale*, 743 P.2d 400, 404 (Ariz. Ct. App. 1987). Since the federal regulations that address obstacles at and around airports are advisory, rather than mandatory, they cannot form the basis for preemption.

---

[1] Mr. DePuy was the Petitioners' expert witness designated to testify on FAA matters.

In fact, the testimony of a variety of witnesses, including the Appellants' own aviation expert, showed that the airport did not have to cut the trees in question in order to comply with the FAA mandates and recommendations cited by the Petitioners. The testimony of Petitioners' own FAA expert was that the establishment of a displaced threshold provides one alternative means through which an airport can comply with the glideslope requirements. DePuy, Mar. 5, 2004, Tr. at 20 (Trust App. at 62). A displaced threshold is a method by which an airport can deal with an obstruction which it does not have the power to remove. It involves the painting of lines and symbols on the runway surface, thereby alerting pilots as to what portion of the runway is usable for landing purposes. Essentially it involves the shortening of the runway in one direction. The Petitioners did not dispute below that a displaced threshold was an available option under the Federal Aviation Act, and one that had been historically used at this airport.

Nonetheless, the Petition seems designed to give rise to what amounts to eminent domain powers to the privately owned airport. *See* Petition at 12, n.4. The Petitioners look to avoid civil liability for what they term to be "federally authorized clearing activities" in favor of the paying of compensation. *Id.* However, contrary to Petitioners' claim, there simply are no federally authorized clearing activities. The Petitioners' expert witness (a former Federal Aviation Administration airport inspector) testified that the FAA regulatory scheme would not permit the FAA to order trees to be cut, even if the trees were on the airport's property. DePuy, Mar. 5, 2004, Tr. at 20 (Trust App. at 62). He also testified that local zoning regulations, which are analogous to the environmental regulations at